IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No.

ALFRED S. PENN,

Petitioner,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 9253

ALFRED S. PENN,

Plaintiff-Appellee,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of October (it being the 7th day thereof) in the year of our Lord One Thousand Nine Hundred Forty-Six and of the Independence of the United States of America, the 171st year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Thursday, October 19, 1946.

Court met pursuant to adjournment.

Present: Honorable John P. Barnes, Trial Judge.

2 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

Alfred S. Penn, *Plaintiff*,
vs.
Chicago & North Western Railroad Company, a corporation, *Defendant*.
} No. 45-C-1148.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 18th day of July, 1945:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—45-C-1148) * *

COMPLAINT.

Now comes the plaintiff, Alfred S. Penn, by Royal W. Irwin, his attorney, and complains of the defendant, Chicago & North Western Railroad Company, a corporation, as follows:

1. On July 27, 1944, the defendant, Chicago & North Western Railroad Company, was a railroad corporation duly organized and existing and was possessed of divers road beds and yards wherein the defendant caused divers cars to be moved and switched, all in the County of Cook and State of Illinois.

2. The plaintiff was then and there employed by the defendant in the capacity of switchman, and stood upon the stirrup of a certain car endeavoring to uncouple said car from the car next to it. The coupler device was out of order and would not work, and the plaintiff stepped down to the ground and had taken one or two steps in order to otherwise uncouple said cars and thereupon stepped into

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an open space between the ties in said road bed, and thereupon plaintiff's foot and ankle were broken and injured.

4 3. That the defendant was then and there a common carrier by railroad and, at the time of the occurrence herein mentioned, was engaged in commerce between the state of Illinois, and the several states of the Union, and the plaintiff at the time of said occurrence herein mentioned was employed as a servant for hire by the defendant in said commerce, and the plaintiff's injury, hereinafter alleged to have been sustained by him, was received while employed and engaged by the defendant in such commerce between the several states of the Union, and the plaintiff brings this action to recover damages from the defendant under the provisions of the Federal Employers' Liability Act.

4. The defendant was then and there guilty of one or more of the following acts of negligence which directly caused injury to the plaintiff;

(a) The defendant carelessly, negligently and unlawfully equipped and maintained on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act.

(b) The defendant carelessly and negligently kept and maintained an open space between divers ties adjacent to said tracks and rails upon which said car was moving.

(c) The defendant carelessly and negligently failed to properly cover over, guard and protect an open space between two ties where a certain tie rod ran to the switch point from the switch stand.

5 5. As a direct and proximate result of said negligence, the plaintiff was greatly cut, bruised, lacerated, wounded and contused in and about the head, body, arms and legs and divers bones in plaintiff's body were broken and fractured and plaintiff was otherwise internally injured and damaged, and plaintiff became and was and has so remained from thence hitherto sick, sore, lame, diseased and disordered, and has suffered great pain as a result thereof, and plaintiff says that by reason thereof he has been and in the future will be hindered and prevented from earning and acquiring divers great gains and profits which he might otherwise have made and obtained; and plaintiff has become liable for and has expended large sums of

money, to-wit: Two Thousand ($2,000.00) Dollars, endeavoring to be healed and cured.

Plaintiff demands damages from the defendant in the sum of Fifty Thousand ($50,000.00) Dollars.

Plaintiff demands trial by jury.

Royal W. Irwin,
Attorney for the Plaintiff.

6 And afterwards on, to wit, the 10th day of August, 1945, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer, in words and figures following, to wit:

7 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—45-C-1148) * *

ANSWER.

Now comes defendant, Chicago and North Western Railway Company, a corporation, by Drennan J. Slater and James B. O'Shaughnessy, its attorneys, and for answer to the complaint filed by plaintiff states the following:

1. Defendant denies that the coupler device referred to in said complaint was out of order or would not work.

2. Defendant denies the allegations of paragraph 4 of said complaint and specifically answering the charge of negligence contained in sub-paragraphs (a) to (c), inclusive, of said paragraph:

(a) Denies that it carelessly, negligently or unlawfully equipped or maintained on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, and denies that defendant in any way violated the provisions of the Federal Safety Appliance Act.

(b) Denies that it carelessly or negligently kept or maintained an open space between divers ties adjacent to said tracks or rails upon which said car was moved.

(c) Denies that it carelessly or negligently failed to properly cover over, guard or protect an open space between said ties where the tie rod ran to the switch point from the switch stand.

8 3. Defendant states that plaintiff was guilty of negligence in operating said coupler device and that

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the sole cause of said accident was plaintiff's own negligence and failure to exercise ordinary care for his own safety.

4. Defendant denies that as a result of any negligence or misconduct on its part plaintiff suffered the injuries or damages referred to in paragraph 5 of said complaint.

Wherefore, defendant asks that the suit of plaintiff be dismissed, with costs assessed against plaintiff.

Drennan J. Slater,
James B. O'Shaughnessy,
Attorneys for Defendant.

9 State of Illinois, } ss.
County of Cook. }

Mary Boylen, being first duly sworn, on oath deposes and says that she caused a copy of the above and foregoing answer to be served on:

Mr. Royal W. Irwin,
160 North LaSalle Street,
Chicago, Illinois;

by placing a true and correct copy of said answer in an envelope so addressed, placing proper postage on said envelope, and depositing the same in the United States Post Office Mail box at 400 West Madison Street, Chicago, Illinois, on the 8th day of August, 1945, at the hour of 3:00 P. M.

Mary Boylen.

Subscribed And Sworn to before me this 8th day of August, A. D. 1945.

Margaret C. Carmody, (signed)
(Seal) *Notary Public.*

10 And afterwards on, to wit, the 9th day of October, 1946, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion, in words and figures following, to wit:

11 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—45-C-1148) * *

MOTION.

Now comes Chicago and North Western Railway Company, a corporation, defendant in the above entitled cause, at the close of all the evidence and moves the court to instruct the jury to find defendant not guilty, and in support of said motion states the following:

1. There is no evidence in the record tending to show that defendant was guilty of violation of the Federal Safety Appliance Act or of other acts of negligence charged in this complaint on the occasion in question.
2. There is no substantial evidence in the record tending to sustain the charges made against defendant in plaintiff's complaint.
3. There is no substantial evidence in the record tending to show that defendant was guilty of the acts complained of in plaintiff's complaint.
4. The undisputed evidence in this case shows that plaintiff himself was guilty of negligence which was the sole proximate cause of the injuries complained of by him.
5. The undisputed evidence shows that at and immediately prior to the time of the happening of the accident, plaintiff himself was guilty of negligence which was the sole proximate cause of said accident.

11-A In the alternative to the above and foregoing motion, defendant moves that the court withdraw from the consideration of the jury sub-paragraphs (a), (b) and (c) of paragraph 4 of plaintiff's complaint, and each of said sub-paragraphs.

Drennan J. Slater,
James B. O'Shaughnessy,
Attorneys for Defendant.

(Denied.)

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12 And on the same day, to wit, on the 9th day of October, 1946, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—45-C-1148) * *

Wednesday, October 9, 1946.

Present: Honorable John P. Barnes, District Judge.

This cause this day again coming on for trial come the parties to this suit by their attorneys, respectively, and the Jury heretofore empaneled and sworn herein also come and the trial of this cause proceeds; further evidence is heard for the plaintiff, the plaintiff rests and the defendant enters its motion for a directed verdict which motion is denied, further evidence is heard and at the conclusion of all the evidence adduced for the parties the hour of adjournment having arrived

It Is Ordered that the Jury be and they are hereby permitted to separate until October 10, 1946, at 10:00 o'clock, A. M.

14 And afterwards on, to wit, the 25th day of October, 1946 there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings before Hon. John P. Barnes, Judge, On Oct. 7–10–, 1946 in words and figures following, to wit:

16 In the District Court of the United States.
* * (Caption—45-C-1148) * *

TRANSCRIPT OF PROCEEDINGS

had and evidence taken in the above-entitled cause before the Honorable John P. Barnes, one of the Judges of said Court, and a Jury, in his courtroom in the United States Court House, at Chicago, Illinois, commencing on Monday, October 7, 1946, at 2:00 o'clock p. m.

Present:

Royal W. Irwin, Esq., (29 South La Salle Street, Chicago 3, Illinois), on behalf of the Plaintiff;

Drennan J. Slater, Esq., (400 West Madison Street, Chicago 6, Illinois), on behalf of the Defendant.

17 And Thereupon The Following Proceedings Were Had Herein:—

(And thereupon, a jury having been duly impaneled, and sworn to try the issues herein, the further hearing of said cause was adjourned until Tuesday, October 8, 1946, at the hour of 10:00 o'clock a. m.)

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18 Tuesday, October 8, 1946,
10:00 o'clock a. m.

Court convened pursuant to adjournment.

Present:

Mr. Irwin.
Mr. Slater.

(Opening Statements.)

19 And Thereupon The Plaintiff, To Maintain The Issues On His Part, Introduced The Following Evidence, To-Wit:—

ALFRED S. PENN, the Plaintiff herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. Irwin.

Q. What is your name?
A. Alfred S. Penn.
Q. P-e-n-n?
A. Yes, sir.
Q. How old are you?
A. Forty-nine years old.
Q. Where do you live?
A. 49 Lake Street, Maywood, Illinois.

By Mr. Irwin: Can you all hear him? Talk real loud, Mr. Penn, so the jury can all hear you.

By the Witness: All right.

By Mr. Irwin:

Q. You were hurt on the 25th of July, 1944; is that right?
A. Yes, sir.
20 Q. You were working for the Chicago & North Western Railroad?
A. Yes, sir.
Q. In the capacity of switchman?
A. Yes, sir.

Q. How long had you worked as a switchman?
A. About eight months.
Q. Was that the first railroad job you had ever had?
A. Yes, sir.
Q. Did you understand railroading? Did you ever switch cars before that?
A. I don't get the question.
Q. That is, you had had eight months' experience as a railroad man when you got hurt; is that right?
A. Yes.
Q. What kind of work had you done before that work, in your life? What were you?
A. I had done coal mining, construction work, hospital work during the depression.
Q. What yard were you working in at the time of your accident?
A. The west end of 8.
Q. What?
A. The west end of 8. The west end of 8.
21 Q. The west end of 8?
A. Yes.
Q. That is in the Proviso Yard, is that right?
A. Yes, sir.
Q. That is out near Maywood?
A. Yes.
Q. And the tracks in this yard run in a generally easterly and westerly direction?
A. Yes, sir.
Q. And the lead track runs across these tracks at a slight angle, is that right?
A. Yes, sir.
Q. Do you know where Wolf Road crosses the railroad switch yard?
A. Yes, sir.
Q. At the viaduct it crosses?
A. Yes, sir.
Q. Cars run underneath the viaduct?
A. Yes, sir.
Q. Who was the engineer of your locomotive?
A. A man by the name of Fairchild.
Q. And the fireman?
A. I don't know his name.
Q. Who was your conductor?
22 A. A fellow by the name of Wescott.

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Q. And you were known as the headman, is that right?
A. That is right.
Q. You worked near the engine?
A. Yes, sir.
Q. Who was the field man, the other man?
A. I don't know who he was.
Q. What kind of a day was it? A bright day?
A. Clear, warm, hot.
Q. The accident happened about noontime?
A. Yes, sir.
Q. You had a cut of cars standing on the lead track, is that right?
A. Yes, sir.
Q. And which end was the engine attached to?
A. At the west end.
Q. And what direction was the engine facing?
A. It was headed west.
Q. So that the engineer was on the north side of the train?
A. Yes, sir.
Q. And which side of the train were you working on?
A. I was on the north side, on the engineer's side.
Q. Where was the conductor at the time you got hurt?
23 A. He was up about 39 or 40 switch, east of there.
Q. That was east of where you were?
A. Yes, sir.

By Mr. Slater: Just a minute. I would like to object to counsel continuously leading the witness. I think he ought to be asked questions. I want to object to the last question, and move to strike the answer, because I think the witness should do the testifying.

By Mr. Irwin: I supposed these were not matters in controversy.

By Mr. Slater: I have not objected up to this time, but I think we should hear from the witness, not from counsel.

By Mr. Irwin: I will not lead the witness from here on.

By the Court: Very well. Do not lead him.

By Mr. Irwin:

Q. Which direction was the conductor from you?
A. He was east of me.
Q. About how far east was he?
A. I would say, oh, five or six hundred feet.

Q. Where was he with reference to this viaduct?
A. East of the viaduct.
24 Q. About how far were you from the viaduct?
A. I guess a hundred feet.
Q. And what direction from the viaduct?
A. West of the viaduct.
Q. How far was your engineer away from you at that time?
A. About ten or twelve cars.
Q. And each car length is about how many feet?
A. About 40 to 50 feet.
Q. How many cars had been in the cut when you first started?
A. That morning we had been taking out—I never counted them, but we had been taking out about thirty cars in a cut, thirty or thirty-five.
Q. How many cars were you going to cut off?
A. One.
Q. What switch track was that going to go into?
A. I never noticed what track it was going to. I just noticed the 1 marked on there.
Q. Is there a mark placed on the car?
A. Yes, there are marks, like 1 for 35, maybe the next one will be 2 for 37, or 5 for 38, but, generally, whenever they are kicking them pretty fast, you just look to see how many are cut. The other guy throws the switch.
25 Q. These marks that you speak about, are they put on the car?
A. Yes.
Q. These marks that you speak about, do you mean chalk marks?
A. Yes.
Q. Who put them on there?
A. Some places the conductor puts them there.
By Mr. Slater: Just a minute. I object to that.

By Mr. Irwin:

Q. Do you know who put them there in this case?
A. No.
Q. They were there, though, were they?
A. Yes.
Q. And were they the marks you used in cutting off cars?
A. Yes, sir.

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Q. And you saw what mark there at this time? What was the sign that you saw on the car?

A. "1 car".

Q. And that meant what to you?

A. Just cut the one car off.

26 Q. Was the train standing still or moving at that time?

A. When I looked at it, it was standing still.

Q. Well, what was the next thing you did?

A. I looked at the conductor, and he gave the kick sign.

Q. What kind of sign is a kick sign?

A. He stands with a paper, or anything he has got, and he gives like that (indicating), overhead. That was to kick.

Q. When he gave that sign, what happened?

A. I got on the car, and when the slack came in, I made an effort to pull the pin.

Q. Was the car moving at the time he gave the kick sign?

A. No.

Q. How soon did it move after that?

A. Oh, I guess twenty or thirty seconds.

Q. And did you get on before or after the car started to move?

A. Just as it started to move.

Q. Which car did you get on?

A. I got on the north—I got on the first car, the car that was supposed to be cut off.

27 Q. Then I was mistaken in my statement that you got on the next one?

A. You was.

Q. You got on the car that was going to be cut off?

A. Yes.

Q. Did you get on the east or west end of that car?

A. On the west end of it.

Q. What did you stand on?

A. On the stirrup.

Q. And what did you hold onto?

A. On the handle.

Q. Why did you get on that car?

A. Well, in hot weather—

By Mr. Slater: Just a minute.

By Mr. Irwin:

Q. Why did you get on?

By Mr. Slater: I want to object to that. I think he can state what he did, but I don't think it is possible to assign reasons.

By the Court: He may answer.

By Mr. Irwin:

Q. Why did you get on that car?

A. In hot weather, it gets pretty tiresome running 15 or 20 feet every minute.

28 Q. What were you to do on that car?

A. Cut the car off.

Q. What do you mean, "cut the car off"?

A. When he gave the kick sign, to pull the pin.

Q. How do you pull the pin?

A. Some of them function different.

Q. This car, how did you pull the pin on this?

A. Up, up.

Q. What did you pull up?

A. The pin lifter.

Q. What is the pin lifter made of?

A. Steel, about an inch and a quarter or inch and a half steel rod.

Q. Round?

A. Yes.

Q. About how long is it?

A. It is about 4½ feet long.

Q. The inside end of that pin lifter, the end towards the inside of the car, what is that connected with?

A. A lock.

Q. How is it connected with the lock?

A. With a link.

Q. And what is the link attached to?

A. To the lock.

29 Q. What is the other end of the link attached to?

A. The pin lifter.

Q. When you lift on the outer end of the pin lifter, when you lift up on it, what does it do to the inside end of the pin lifter?

A. It lifts up.

Q. What does that do?

A. Releases the knuckle.

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Q. And when that knuckle is released, what does that do?

A. It separates the cars.

Q. Uncouples the cars, is that right?

A. Yes, sir.

Q. And when you got hold of this pin lifter on the outside end, what did you do to it?

A. Whenever I got the slack, I made an effort to lift it.

By Mr. Slater: Just a minute. I move to strike out the answer as not responsive.

By the Court: Let it stand.

By Mr. Irwin:

Q. When you pulled on the pin lifter, what did it do?

A. It did not function.

Q. It did not function. What did you do then?

30 A. I made another effort, a harder effort to get it.

Q. How did you do it?

A. I jerked harder.

Q. What happened to the pin lifter then?

A. Just like it was.

Q. What did you do after that?

A. I made about five or six efforts to get it, on the car.

Q. You mean, while you were standing on the car?

A. While I was standing on the car.

Q. Did the pin lifter work while you were standing on the car?

A. It did not.

Q. You said you waited for the slack. What do you mean by that?

A. Just as soon as they kick these cars, when all of the weight comes together, you can operate that pin. Otherwise you can't.

Q. How far do the cars have to move before you can operate the pin?

A. Just as soon as the slack comes in.

Q. What is that?

A. Just as soon as they come together.

Q. Had they come together before you operated the

31 pin or afterwards?

A. They was together when I operated the pin.

Q. When you tried to operate it?

A. When I tried to operate it.

Q. And did the pin lifter operate at that time?
A. Not until after I got off the car.
Q. Should it have operated at that time?
A. It should.
Q. Why did you get off the car?
A. Well, I was wearing myself down making a stronger effort to try to get it. I thought if I could get off, it would be easier, and I could get it.
Q. What did you do?
A. I stepped off, and made three efforts.
Q. And what happened to the pin?
A. It come.
Q. What happened to you?
A. I went in a hole.
Q. What hole?
A. Between the ties.
Q. At the time that the pin lifter came, at the time it operated, was that the first time that it operated?
A. It was.
Q. How did you make it operate?
32 A. Sir?
Q. What did you do to make it operate?
A. Three times I gave it all I had, after I got on the ground.
Q. You mean while you were running along?
A. Yes, sir.
By Mr. Slater: Just a minute. I want to object to this continually leading the witness.
By the Court: Sustained.
By Mr. Slater: I want to move to strike counsel's statement.
By the Court: Let it stand.

By Mr. Irwin:

Q. What did your foot go into?
A. Between the rod, the tie rod and the tie.
Q. How far are the ties apart?
A. They vary. About 12 to 15 inches apart.
Q. Is there anything in between the ties?
A. In this particular tie, there was a rod.
Q. I mean the other ties, what about the surface?
A. Well, cinders and other stuff, gravel.
Q. I am talking about the condition there, as to whether there is a place for you to walk. Describe what it looked like.

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33 A. Outside the lead, it is like that floor is there.
Q. Is that where you were?
A. That is where I was working.
Q. When you were running along the side there?
A. I was running along a place like this (indicating), but the ties come through, with this switch down over here about 4 or 5 feet, but I had to stay with that car, trying to get that pin.
Q. How fast were these cars going at the time that you were running along the side?
A. Between 6 and 8-mile an hour.
Q. These cars you were switching, do you know where all those cars went, whether they went out of the State or not?
A. Yes, sir.
Q. They were billed for all over, California, Colorado, Nevada, Missouri.
Q. When your foot went down in this open space, what particular place did your foot go in, what happened to your foot?
A. It slid in between the rod and the tie.
Q. What happened to your foot?
A. It stayed there, temporarily.
34 Q. And what happened to the train?
A. It went on.
Q. How did you get your foot out?
A. I fell over on my face—or on my hands.
Q. How did you get your foot out?
A. It broke loose when I went over.
Q. It broke loose when you fell over, you say?
A. Yes.
Q. How did it feel at that time?
A. Well, it was painful, very painful.
Q. Where did you go from there?
A. I walked over to the bridge. They asked me if I could walk, and I said I don't know. I stood there. Everyone asked me as they came up to me how it happened, and I had to tell three different men how it happened.
Q. And then where did they take you?
A. They walked me over to the viaduct, and I sat down.
By the Court: We will recess at this time, ladies and gentlemen, until 2:00 o'clock. Remember what I said to you last evening about discussing the case. Do not discuss it with anyone, or permit anyone to discuss it with you.

By Mr. Irwin: I made arrangements for two doc-
35 tors at 2:00 o'clock. We obviously will not be ready for them. May I make arrangements, if I may get them on the telephone?

By the Court: Yes.

I have to recess this afternoon at 3:45.

You may be excused, ladies and gentlemen, until 2:00 o'clock.

(Whereupon the jury retired from the courtroom.)

By Mr. Irwin: I wonder if we can put Dr. Zeitlin on at 2:00 o'clock? He is an X-ray man, he has nothing to do with the facts of the case.

By Mr. Slater: Are there any hypothetical questions? Dr. Zeitlin is just as available, today or tomorrow. He is continually on these cases. I think he ought to be taken in his proper order. He is within two blocks of here. He can get here as easily as a lawyer can get to court. I object to the case being broken into at this time.

By Mr. Irwin: Dr. Zeitlin is every morning in the hospital, he is taking fluoroscopic work, and that, from the time he gets there at a quarter to nine until twenty-thirty. It is impossible to get him in the morning.

36 By Mr. Slater: I think it prejudices the defendant's case, before I have a chance to cross-examine. It is the regular thing to do that, rather than the exception.

By Mr. Irwin: Very well. Very well.

Dr. Zeitlin is a busy man, and these men are all busy.

By Mr. Slater: Most people are busy.

By the Court: I will give you an opportunity.

(Whereupon an adjournment was taken until 2:00 o'clock p. m. of the same day, Tuesday, October 8, 1946.)

BLEED THROUGH – POOR COPY

37 Tuesday, October 8, 1946,
2:00 o'clock p. m.

Court convened pursuant to recess.

Present:

Mr. Irwin,
Mr. Slater.

ALFRED S. PENN, the Plaintiff herein, called as a witness in his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination by Mr. Irwin (Continued).

Q. I think you said you walked over to the viaduct?
A. Under the viaduct.
Q. What did you do there?
38 A. Sat down for a little bit.
Q. What did you notice about yourself then, at that time?
A. It was getting awful painful.
Q. What did you notice about your foot?
A. Well, it got to where I couldn't bear much weight on it, it was so painful.
Q. Did you take your shoe off?
A. Not there.
Q. Where did you go from there?
A. I went down to the switch shanty, in front of 39 switch.
Q. And then from there?
A. I sat around there for about fifteen or twenty minutes, and finally pulled off my shoe.
Q. Where were you taken from there? Did you go to a doctor, or hospital?
A. I went to the yard office.
Q. From there where did you go?
A. I went to the hospital at Elmhurst.
Q. What doctor did you see there?
A. Dr. Hills.
Q. What did he do for you?
A. He gave me a hypo, and put my leg in a cast.

39 Q. Right there?
A. Yes.
Q. At that time?
A. Yes.
Q. Did you stay in the hospital?
A. I did not.
Q. When did you next see a doctor at that time?
A. I think it was the next day.
Q. How did you get from the doctor's office to your home?
A. I was brought home.
Q. In an automobile?
A. Yes.
Q. And you went to the doctor's office the next day?
A. Yes.
Q. Anything done for you at that time?
A. I think he X-rayed it again the next day.
Q. How long did the cast remain on your leg?
A. About forty-five days.
Q. How many times during that period of time did you see Dr. Hills?
A. He went on a vacation, I think, after the second time I seen him, and I never seen him, I think it was for a month.
40 Q. Did somebody in his office take care of you?
A. No.
Q. Who did?
A. Nobody.
Q. What did you do during that time he was away on a vacation?
A. Just sat around home.
Q. When the cast was taken off of your leg, how did your leg look at that time?
A. Swelled up, and fiery.
Q. Swelled up, and what?
A. Fiery, enlarged and inflamed.
Q. How did it feel?
A. Very painful.
Q. Did you go back to the doctor after the cast was taken off?
A. He put another one on the same day he took that one off, he X-rayed it and put on another one.
Q. How long did that second cast remain on?
A. About forty-five or fifty days.
Q. You were able to walk on crutches, were you?

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A. Yes, sir.
Q. During the period the second cast was on, who took care of you?
41 A. He did, once a week.
Q. When the second cast was taken off, how did your leg look?
A. Fiery and enlarged.
Q. How did it feel?
A. Very painful.
Q. Was another cast put on after that?
A. No.
Q. What did you do about your leg after the second cast was taken off?
A. He said I had to bear a little weight on it, with crutches.
Q. What?
A. He said I was to bear a little weight on it, I was still on crutches. He said it takes a week or ten days, bearing weight on it.
Q. When did you go back to work the first time?
A. I think it was in November, '44.
Q. Did you go back to the North Western?
A. Yes, sir.
Q. What kind of work did you?
A. Braking on the road.
Q. Braking? You mean through freight?
A. Through freight, yes, sir.
42 Q. Road freight?
A. Yes.
Q. How long did you do that?
A. I made a couple of trips, and I was turned in and pulled out, and sent to Dr. Cutter, I think it was, and he examined me.
Q. Dr. Cutter?
A. Yes, sir.
Q. He is now dead, is he?
A. Yes, sir.
Q. What did Dr. Cutter do for your leg?
A. He gave me a band to put on my leg, and sent me back to work.
Q. And did you work then?
A. After I was off several days, I did.
Q. What kind of work did you do then?
A. They ordered me back to the same kind of work.
Q. Braking?

A. Yes.
Q. How long did you work as a brakeman?
A. From some time in November until the 3rd of February, 1945.
Q. And what happened at that time?
A. I fell and hurt the outside of my leg.
43 Q. Did you go to a doctor about it?
A. Yes, sir.
Q. What doctor?
A. Dr. Joslyn, at Maywood.
Q. Was he your own doctor?
A. No, sir.
Q. A company doctor?
A. Yes, sir.
Q. How long were you off work on account of that?
A. A couple of weeks.
Q. Then were did you go?
A. I went to the Buick Aircraft.
Q. You took another job, did you?
A. Yes, sir.
Q. What kind of work did you get there?
A. Janitor work.
Q. How long did you work at Buick?
A. About five weeks.
Q. Then were did you work?
A. Douglas Aircraft.
Q. How long did you work there?
A. I think it was from May, some time in May, until September, 1945.
Q. By the way, how much did you make a day while
44 at Buick?
A. Well, I made about $34.00 a week.
Q. And how much at the Douglas?
A. About thirty—when they put me on bench work, I made more. When I started, I made about thirty-seven, or thirty-eight, or thirty-nine dollars a week.
Q. What did you make doing bench work?
A. Well, the more hours I was sitting down,—
Q. How much did you make an hour?
A. Ninety cents, ninety-five.
Q. How long did you work at Douglas?
A. From some time in May, 1945, until September, I think it was.
Q. Why did you quit there.
A. I got laid off. The plant was closing.

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Q. Where did you work after that?
A. At the Westward Ho Golf Course.
Q. What did you do there?
A. Cleaning up, cutting grass, and one thing and another.
Q. How much did you make doing that?
A. I started in at ninety cents, and they raised it to a dollar.
Q. How long did you work doing that?
45 A. I think about six weeks.
Q. Where did you go from there?
A. Jefferson Electric.
Q. What did you do there?
A. Stockman.
Q. How much did you make?
A. About seventy-five cents an hour, somewhere around in the neighborhood of seventy-five cents an hour.
Q. During all this time, how did you get along with your leg?
A. Well, it is painful, very painful.
Q. What about standing on it?
A. I get tired. It is very painful.
Q. What kind of work have you been doing in the last year? Are you working now?
A. No, sir.
Q. How long has it been since you have worked?
A. The last work I done was the 14th of January, 1946.
Q. Have you tried to get work since then?
A. I have.
Q. When you apply for work, what is the practice as to whether or not they examine you physically?
A. Well, at Mars Candy Company, I filled out—
By Mr. Slater: Just a minute. I do not think this
46 is competent. He is dealing with some other company.
By the Court: Step in the jury room, ladies and gentlemen.
(Whereupon the jury retired from the courtroom and the following proceedings were had outside the presence of the jury:)
By Mr. Slater: I do not think that would be binding on us, your Honor, what happened with some other company. We have no possible way to meet it or controvert it. I did have the opportunity of taking a pre-trial discovery deposition before the case was tried the first time, but I cannot possibly meet testimony on how he applied

to some other company, and did not get work, and things like that. The fact remains he had about four or five jobs, that he has already told about. Now he is telling about jobs since the first trial, and I think he can say what he has done, but I do not think he can tell about transactions with other people.

By Mr. Irwin: I suppose it is a matter of common knowledge that, in the present day, employees are
47 required to sign applications in which the history of their life is required, and they are required usually to submit to physical examination, and some of them even go so far as to take X-ray pictures.

Under the State of Illinois Workmen's Compensation Act, a man who has any physical defect is a hazard, and employers' insurance companies require employees of good physical make-up, without defects.

By the Court: What do you propose to show?

By Mr. Irwin: I had nothing in particular in mind except to show that at some places he has been required to submit to physical examination, and he has been required to divulge the fact he has had this injury, and it has meant he did not get employment.

I am perfectly frank in stating to the Court I think possibly it is a little bit tenuous, I don't know. I think it is a matter of common knowledge, but whether I can prove it as a fact I do not know.

By Mr. Slater: I think it is the equivalent of hearsay testimony, and somebody else saying he wasn't fit to
48 go to work. I think he should prove that by competent medical testimony.

By the Court: I am not sure. Of course, if you are not sure of your position—

By Mr. Irwin: You asked me the question, and I am telling you, it never came up before that I have known of.

By the Court: The man has been out of work for a year. Why? If, in the course of that year, he has been to twelve different plants, and has been required to submit to a physical examination, and state his history, and whether or not he has had an accident, and what kind of an accident, in connection with the physical examination, that might have a bearing on the failure to work during that year.

By Mr. Slater: I still think that would be hearsay testimony. How can he come in and testify that somebody told him he could not work?

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By Mr. Irwin: I think, your Honor, I won't take a chance of putting it in. I think I will just drop it here. I think, as a matter of argument to the jury, I can make it, as a matter based on common knowledge.

49 By the Court: All right. Bring in the jury.

(The jury returned to the jury box, and the following proceedings were had in the presence of the jury:)

By Mr. Irwin:

Q. Do I understand, Mr. Penn, that you have not worked, then, since the early part of this year?

A. Since the 14th of January.

Q. What has been the condition of your foot and leg during this time, this last time?

A. It is swollen up, and it is very painful. It has not improved any that I can see.

Q. What is the position of your foot, that is, the position of your foot as relates to your body when standing, now, as compared with what it was before you got hurt?

A. Rigid.

Q. What is that?

A. Rigid.

Q. But the position, is it straight ahead, or what do you notice about that?

A. All I notice is, it is twisted-like.

Q. Twisted?

A. Yes.

50 Q. Which way is it twisted?

A. Kind of out.

Q. Out?

A. Yes.

Q. You walk on the inside part of your foot?

By Mr. Slater: Just a minute. I object.

By the Witness:

A. It seems like there is more strain on this side.

By Mr. Slater: Just a minute. I again want to object to putting the words in the mouth of the witness, on this type of question. I want to object to the last question.

By the Court: Sustained.

By Mr. Irwin:

Q. Tell us now what you see about your foot, about the position of your foot.

A. Well, it is drawed from the outside, like a sprain on this bone here, after I have been on it.

Q. Raising your foot like that, and down that way. Will you take your left foot, and hold it up, and show how high you can raise it up?

A. (Witness indicating.)

Q. Now do that with your other foot.

A. (Witness indicating.)

51 Q. Turn your foot in and out like that (indicating).

A. (Witness indicating.)

Q. Now, do it with your other foot.

A. (Witness indicating.)

Q. When you were working for the railroad company, how much were you earning an hour, or a day?

A. $8.54 for eight hours.

Q. $8.54?

A. Yes.

Q. And that meant how much money, six or seven days a week?

A. Yes, sir.

Q. How much, how many days?

A. I would generally double three or four times a week.

Q. What do you mean by that?

A. Work overtime.

Q. You mean the full shift overtime?

A. Yes, sir. I would work sixteen hours lots of times, and then twelve, thirteen, fourteen hours, various hours.

Q. And how much would you make a month?

A. About $350.00, or $375.00.

By Mr. Irwin: You may cross-examine.

52 *Cross-Examination.*

By Mr. Slater: Will you mark this Defendant's Exhibit 6-A for identification?

(Said photograph was marked Defendant's Exhibit 6-A, for identification.)

By Mr. Slater:

Q. Mr. Penn, I would like to show you some photographs that are marked Defendant's Exhibits 7, 8 and 9. Will you put on your glasses and take a look at these, please? (Handing same to the witness.) Have you looked at them?

A. Yes.

Q. Do those correctly show the vicinity of the accident?

A. Yes, sir.

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Q. The switch where you got hurt was switch No. 35, wasn't it?

A. In that vicinity.

Q. You say "In that vicinity". Wasn't it the switch that was just west of Wolf Road?

A. Somewhere close to there, yes.

Q. Was it the first switch west of Wolf Road Bridge?

A. I think it was.

Q. You were working on the north side of the
53 track and of the cut of cars, were you not?

A. Yes, sir.

Q. How many cars were there in the cut when the engine started switching these cars out on to the classification tracks?

A. Out of this cut?

Q. Yes.

A. Well, we had been pulling thirty and thirty-five out all morning. I couldn't say, I couldn't swear to how many there were in this one special cut.

Q. Would it be your idea that there were about twenty to thirty cars that the engine had hold of and was shoving east, and classifying, and putting on various tracks?

A. About that, I should say.

Q. I am referring my questions now to this one cut of cars that was involved at the time of the accident. Were there about ten or twelve cars left at the time you were hurt?

A. Somewhere about them. I never counted them.

Q. That meant there were anywhere between ten and twenty cars that had been switched out before the accident, is that right?

A. Yes.

54 Q. Were you the one that pulled the pin on those?

A. I was.

Q. Had you pulled the pin to switch them out separately, or would there by a bunch of cars that would be switched out at one time, in this particular cut?

A. It just depends.

Q. Do you have any recollection about that?

A. I don't have any recollection of any mass of cars being switched.

Q. You have your hand up to your mouth. I can't hear you.

A. I don't recollect of any mass of cars being switched.

Q. Do you think you had switched these cars out one at a time?

A. Singles, ones, and doubles, and such as that, I believe.

Q. So that there might have been four or five switches made before you came to this car when you got hurt, is that right?

A. Yes, sir.

Q. When the engine started shoving these cars back east, did it come to a complete dead stop each time a
55 car was cut off?

A. Yes, sir.

Q. How many times do you think the engine came to a dead stop from the time it first had these twenty or thirty cars until it got down to the ten or twelve cars you had when the accident happened?

A. I didn't count it.

Q. Would you say roughly as many as five or six times?

A. I wouldn't swear to that. A man doesn't notice every move that is made.

Q. Can you give me any idea about how many times the engine came to a stop?

A. I can't tell you.

Q. Would you get on the side of one of the cars each time when you cut out these ten to twenty cars before the accident?

A. I would.

Q. And you would ride in the stirrup on the north side of the car?

A. I would.

Q. When the train came to a stop just before it switched out this car that you were handling before you were hurt, where was the east end of the cut with reference to switch No. 35?

56 A. Where I was standing it was about, I guess, 30 or 40 feet. The east end was beyond me.

Q. How far west of switch 35 was the east end of the cut of cars?

A. Well, I don't know. When I got up there east of the switch, when I got out of the switch, I was east of there, and the east end of that car was beyond me.

Q. This was after the accident, you are talking about?

A. Yes.

Q. I am talking about before the accident. Did I understand you to say that just before the accident occurred,

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the train was standing still, and you went over and got on the side of the train?

A. I never went over. I was standing there.

Q. What I am trying to get at is, when you got on the side of the car, how far west of switch 35 were you?

A. I don't know, I never had noticed the distance. I was beyond 35.

Q. What is that?

A. I was west of 35, but I don't remember how far.

Q. Can you give me some idea? Would it be 200 feet, or 50 feet, or 10?

57 A. Oh, it wasn't that far. Maybe 50 or 60 feet, maybe 80 feet.

Q. Do you recall that you previously testified on this subject?

A. Yes, sir.

Q. And you testified here in court, did you not?

A. Yes, sir.

Q. Do you remember stating that you were about a car length and a half west of switch 35, when you got on?

A. Something like that.

Q. That is the fact, isn't it?

A. That is about 90 feet.

Q. How long is a car length?

A. The average, 60 feet, 50 feet, 40 feet.

Q. As a matter of fact, isn't the longest car 50 feet, and don't they average about 40 feet?

A. Some of them do. Gondolas is about 40 feet.

Q. Do you know where switch No. 34 is?

A. I think I do.

Q. That is just west of switch 35, isn't it?

A. 33 comes in there somewhere. There is a double switch in there somewhere. It has got me puzzled.

Q. What is the switch just west of switch 35?

A. There is 32, I think, comes in there, and one of

58 them is a double switch. It is confusing to me.

Q. How far west of switch 35 was the next west switch?

A. From 35? There is a pair of switches in there.

Q. I am asking you how far west do you have to go from switch 35 until the time you get to the next switch to the west?

A. About 50 or 60 feet.

Q. You walked over to a point about 50 or 60 feet west

of switch 35 when you got on the side of the car, didn't you, when you first got on the side of the car?

A. Yes, it was west of 35.

Q. Was it about 50 or 60 feet west of switch 35?

A. Somewhere around there.

Q. Where would that put the east end of the cut, when you got on the rear end of the first car?

A. Around 35.

Q. Yes. The east end of the train would be at switch 35, then, wouldn't it?

A. Yes.

Q. When you got on, stepped on to the stirrup, was that the stirrup on the northwest corner of the leading car?

A. Northwest corner?

Q. Yes.

59 A. Yes.

Q. And was that leading car a gondola car?

A. It was a type of gondola, yes.

Q. By "gondola", you mean an open car, don't you?

A. An open car, yes.

Q. I want to show you these photographs, marked Defendant's Exhibits 6 and 6-A, and I would like to have you take a look at these two photographs of a gondola car, and ask you to state whether that shows the type of car and the type of pin lifter. I do not mean the precise car, but does that demonstrate the kind of a car on which you rode?

A. Yes, but it was a wider beam here (indicating).

Q. What do you mean by "beam"?

A. This thing here (indicating).

Q. You mean a little platform here at the east end of the car?

A. The platform, yes.

Q. There was a little wider runway or platform, is that right?

A. Yes.

Q. Was there any observable difference between the photographs that are shown here, and the car on which you rode?

60 A. It was something like this car, like that.

Q. Is that a fair representation?

A. Yes.

Q. Except the platform?

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A. It wasn't the car, though.

Q. I understand that. The platform you refer to now would be the platform at the west end of the car on which you rode, would it not?

A. Yes.

Q. About how wide would you say that platform was?

A. Well, about 14 inches.

Q. When you got on the stirrup, was the train moving then?

A. I don't know. If it was, it was moving so slow that I didn't notice it, I didn't use no exertion getting on.

Q. Might it have been moving from a previous kick of cars, and the engineer not brought it to an absolute dead-stop?

A. No, sir, no, sir.

Q. You say it might have been moving. Do you mean it might have started up at that time, or what do you mean by that?

A. No, sir. I was hanging on the car, and seen the
61 man give the kick sign, watching in the shade of the car, and the car hadn't been moving, and when I got the kick sign, I stepped up.

Q. Let me ask you this question, then: where did you come from to get to the west of this car you got on? Had you been to the east of it?

A. I had been to the east end when I cut the previous car off.

Q. Then did you walk back about a car length?

A. Yes.

Q. And did you walk back about the distance from switch 35 to switch 34?

A. Well, listen, this varies. When they are kicking them cars, they start further up, and every time they kick, their east car is farther down the lead.

Q. I am asking you, when you cut off the car just before this, you then walked back about a car length to the place you got on?

A. I guess I had walked that far back.

Q. Do you now know whether the train was moving, or stopped, as you got on the side of it?

A. It was stopped.

Q. Dead-stopped, was it?

A. Yes.

62 Q. When it was at a dead stop, would the slack be in or out?

A. It just varies. It could be the slack could be in, in some of them, or it could be out.

Q. I am talking about this lee car, the one at the east end.

A. It could be different, it could vary.

Q. Do you know, then, whether the slack was in or out on that most easterly car, when you got on the side of it?

A. No, sir.

Q. Did you go over to examine the coupler or the knuckles, to see whether the slack was in or out?

A. I did not. You don't do that.

Q. You didn't go back that far west, then, did you? You just went west as far as the stirrup when you got on, didn't you?

A. That is as far as you are supposed to go.

Q. You didn't go on west, further, two or three feet, until you were opposite the draw bar?

A. You still couldn't tell whether you had the slack in or out.

Q. I am asking you whether you went any further west than the stirrup?

63 A. No.

Q. Did you see the conductor give a kick sign before you stepped on the side of the car?

A. Yes.

Q. And did you get on almost immediately after he gave the kick sign?

A. Yes.

Q. Then did the cars start moving back to the east?

A. Yes, sir.

Q. Assuming the slack was out when you got on, was the slack immediately taken up as soon as the east car moved back toward the east?

A. Just as soon as that impact came in, they started bunching.

Q. As soon as the east car started moving back to the east, the slack was in, wasn't it?

A. Yes, sir.

Q. And you could have pulled the pin at that time if the pin had been in operating condition?

A. Yes, sir.

Q. And you wouldn't have to run along any distance, you could have pulled the pin at once, could you?

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A. I was supposed to, if it was in working order.

Q. It would not be necessary to reach back so far in
64 order to pull the pin, all you would need to do would be to reach in there and pull the pin?

A. Yes, sir.

Q. But you had been riding the cars back east for a distance each time you had cut off cars, is that right?

A. Yes, sir.

Q. How far would you ride the cars back east each time you got rid of the preceding cars?

A. Until I got the pin unhooked.

Q. I am talking about the preceding cars.

A. I don't know how far I rode.

Q. Would you ride as much as a car length east when you cut off the preceding cars?

A. It just depends on how far he kicked them.

Q. You would ride farther east if he kicked the cars harder, when you were pulling the pin?

A. No, it wouldn't have varied. Just as soon as I see that pin comes, I get off, if it is possible.

Q. Would it make some difference whether the engineer would kick the cars real hard, or kick them easy, as he would shove them back to the east, as far as pulling the pin is concerned?

A. Not if the pin would function, and you had the slack.

65 Q. What is that?

A. Not if the pin would function.

Q. Do you remember this question was asked you when you testified here before, and you made this answer? Mr. Irwin asked you this question, and you made this answer:

"Q. Does it make any difference how hard the slack is in and how hard they are pushing?

"A. Sometimes it does, and sometimes it don't."

Do you remember that question was asked you, and you made that answer?

A. No, I don't.

Q. What?

A. I don't remember.

By Mr. Irwin: Mr. Penn, will you take your hand down, please?

By the Witness: I don't remember that.

By Mr. Slater:

Q. What do you now say as to whether it would make any difference in pulling the pin how hard the engineer shoved the cars back to the east?

A. How hard?

Q. Would it make any difference on pulling the pin whether he shoved the cars hard back east, or shoved
66 them easy?

A. Not if they was in good order. When they are, if the slack is together, the pin is supposed to pull.

Q. And it would do so within a few feet, would it?

A. Just as quick as you got the slack.

Q. As soon as the car moved a few inches, you could pull the pin, could you?

A. Yes, sir.

Q. Do you remember that this question was asked you by Mr. Irwin, and you made this answer:

"Q. How far had the car moved before the slack came in?

"A. I would say a couple or three feet."

Were you asked that question, and did you make that answer?

A. I don't remember.

Q. Is it true that the car moved back a couple or three feet before the slack came in?

A. I don't remember that.

Q. Might it have been a couple or three feet?

A. Sure.

Q. Before the slack came in?

A. With the first move, the slack can run out.

Q. If the slack ran out at that time, then you could
67 not pull the pin, could you?

A. You couldn't pull the pin,—

Q. There wouldn't be anything wrong with the pin if the—

A. (Continuing) —but the next impact, the slack is going to come in.

Q. Just a minute. If the engineer pushes the cars back hard to the east, then you may have the slack run out, is that correct?

A. He could knock it out of a few, but it will run right back in.

Q. If he did that, and you pulled it when he knocked the slack out, you could not pull the pin, could you?

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A. No, but that is just a variation of about two or three seconds.

Q. How far in all did the car move from the time you got on until you got off? Was that 50 or 60 feet?

A. Yes, or better.

Q. I want to get your idea, now. What do you say it is? The distance the car moved, from the time you got on until you got off?

A. I would say 60 feet.

Q. During that time was there an acceleration in the speed of the train? Did the train go faster as it went
68 back east?

A. Well, after he started up, it did.

Q. You mean, after he got moving, he started going faster?

A. Yes.

Q. How fast was he going when you got off?

A. About 6 or 8 miles an hour.

Q. How far west of switch 35 were you when you got off?

A. About three or four steps.

Q. Before you got off, did you see the switch stand and the switch ties and the switch rod?

A. Yes, I seen part of it.

Q. Were you looking at them at the time?

A. I was keeping my eye on the pin and it, too.

Q. Were you looking at the switch stand about the time you got off?

A. Yes.

Q. And then immediately, two steps after you looked at the switch stand, you put your left foot into the switch stand, did you?

A. Yes, sir.

Q. Do you remember how many times you pulled the pin after you got off the car?

69 A. Three times.

Q. Are you sure about that?

A. Yes, sir.

Q. Do you remember testifying here before, and you were asked this question, or these questions, by Mr. Irwin, and made these answers:

"Q. Did you cut the coupling?

"A. Yes.

"Q. The first time?

"A. No.
"Q. How many times—
"A. Twice.
"Q. Was it before you got the pin, pulled it out?
"A. Twice.
"Q. Twice?
"A. Yes."

Do you remember testifying those times that it was twice that you pulled the pin after you got off?

A. No, sir, I don't remember that.

Q. And do you remember that these questions were asked you:

"Mr. Irwin: Q. Tell us how your foot got hurt, or twisted, or caught in there, what happened to it?

70 "A. After I pulled the pin the second time, my foot slid over and it caught down there and I went over on my face and at the same time the pin come."

Was that question asked you, and did you make that answer?

A. Something like that, I remember.

Q. Now, is it twice or three times that you pulled the pin?

A. I pulled the pin three times.

Q. When did you first tell anyone that you pulled the pin three times?

A. Do what?

Q. What was the first time that you told anyone that you pulled the pin three times?

A. I never have told anyone that.

Q. Didn't you testify, both on direct examination and cross-examination here this morning and this afternoon, that you pulled it three times?

A. Yes, but I didn't tell no one that, only here.

Q. Is today the first time you ever told anyone you pulled the pin three times?

A. As far as I remember, yes.

Q. You remember that I asked you questions on the

71 previous trial, and I asked you this question, and you made this answer:

"Q. Then in those three or four steps that you made, you pulled the pin twice, and the second time you pulled it after you got off it worked properly?
"A. Yes, sir."

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Was that question asked you, and did you make that answer?

A. I don't remember that.

Q. When you did pull the pin, whether it was the second or third time, the pin operated properly, didn't it?

A. Yes, but I gave it a lot of strain.

Q. Let me ask you, now, when you pulled the pin, and the car was cut off, did the pin operate properly?

A. Well, I didn't know. It was under a lot of effort. It cut loose, yes.

Q. All right.

A. I don't know whether you would call it proper or not.

Q. One of these couplers is a pretty big thing, isn't it?

A. Yes, sir.

72 Q. How much would you say a coupler weighs?

A. I never seen one weighed. They are cast iron.

Q. Do you think it would weigh two or three hundred pounds?

A. Yes; three or four hundred pounds.

Q. What is that?

A. The whole thing, knuckle and all, would weigh three or four hundred pounds.

Q. Are you familiar with a coupler, do you know what it is that keeps the knuckles from pulling apart?

A. I never did see inside of one.

Q. Do you know what it is that is in a coupler that keeps it from pulling apart?

A. It is a pin that drops down and holds behind the knuckle.

Q. Is that called the locking bar?

A. It is.

Q. When the couplers are stretched out, you cannot use the pin to pull that locking bar up, can you?

A. No, sir.

Q. Even if the coupler is in perfect condition, you still cannot do that, can you?

A. No, sir.

Q. And as you rode along the side of the car there,

73 you were stretched out in an awkward position, were you not?

A. Yes, sir.

Q. And it was unhandy for you to reach around and pull this pin?

A. It wasn't unhandy. That drawbar lifter was back.
Q. You couldn't get good leverage, could you?
A. When it wouldn't function, I thought that was the trouble. That is the reason I got off.
Q. The reason you got off was you thought you would have better leverage if you were off the car?
A. Yes, sir.
Q. When you got off, was the train going along about the same speed, or was it picking up speed all the time as you got off?
A. About the same speed.
Q. What is the condition of the ground along between the switches on the north side of the track? Is it level?
A. Generally level.
Q. And was it level on farther east of switch 35?
A. Beyond that?
Q. Yes.
A. Yes.

74 Q. Do you remember that after the accident you signed a statement, what is known as a 148 Report, on how this accident occurred?
A. Was that a statement?
Q. Yes, a 148 Report.
A. At the yard office?
Q. Yes, at the yard office.
A. Yes, I remember signing a statement.
Q. Was that typed out?
A. I don't know. I was in such pain, I don't remember.
Q. Did you sign your name to the statement?
A. I don't remember that I did.
Q. Did you tell the chief clerk there, Edward C. Kett, about how the accident happened?
A. Eddie Kett, yes, I learned of his name afterwards.
Q. Did you tell him this:
"I was pulling pins and conductor give a cut sign and train was going a little fast and I got off to pull a pin and I stepped in Track 35 switch and caught my heel in between switch rod and tie and turned my left ankle."? Did you tell him that?
A. Something to that effect.

Q. Did you tell him anything at that time about 75 the pin not properly operating?
A. I told him it didn't come, I had made several efforts.

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Q. Who was it you told that, that the pin wouldn't operate?

A. Kett.

Q. Did you also, about two weeks after this accident, tell someone from the Claim Department, Mr. A. L. Mc Kinney, how this accident occurred?

A. That wasn't the name he gave me.

Q. Was there someone from the Claim Department?

A. He introduced himself as Mr. Thompson.

Q. Did he tell you he was from the Claim Department?

A. He said, "My name is Mr. Thompson. I belong to the Claim Department of the North Western Railway."

Q. Did he have a typewriter at that time, to take the statement?

A. He did.

Q. Did you sign the statement?

A. I did.

By Mr. Slater: I would like to have this marked Defendant's Exhibit 3.

(Said document was marked Defendant's Exhibit 3, for identification.)

76 By Mr. Slater:

Q. I would like to show you this 148 Report I referred to, which is marked Defendant's Exhibit 3, for identification, and ask you to look at that and state whether that bears your signature at the bottom. (Handing document to the witness.)

A. Yes, sir. Yes, sir, that is my signature.

Q. I would like to show you document dated July 28, 1944, and ask you to state whether this bears your signature at the bottom of the page, "Alfred S. Penn," and whether the words above it, "I have read this statement, which is true"—whether that is your handwriting?

A. Yes, sir.

Q. What is that?

A. But I didn't read it. My glasses was broken.

Q. I am just asking you now whether that is your handwriting.

A. Yes, sir, that is my handwriting.

Q. I want to show you statement which is dated November 15, 1944, and ask you to examine it and state whether that bears your signature at the bottom, and whether the longhand at the bottom of the page, which reads, "I have

read this and it is true to the best of my knowledge" is in your handwriting?

77 A. Yes, sir.

Q. This statement that was made in July, on July 28, 1944, where were you at the time that statement was made?

A. In my home.

Q. And the statement that was made on November 15, 1944, where was that made?

A. In my home.

Q. Had you returned to work for the Chicago & North Western at the time you made the November 15, 1944, statement?

A. I was out of service.

Q. Didn't you start back to work?

A. I had been pulled out of service.

Q. When did you start back to work for the Chicago & North Western following the accident?

A. In October some time.

Q. Wasn't it before the 15th of November?

A. It might have been, but I worked a few days, and they pulled me out of service.

Q. You had the cast off of your foot by the time you made this second statement, anyway, didn't you?

A. Yes, sir.

Q. When the man from the Claim Department

78 came to see you on July 28, 1944, did you tell him how the accident occurred?

A. I tried to.

Q. And did you tell him this:

"From my position on this car I had tried to pull the pin, but it did not raise. So I was going to get off on the ground and run along with the car, jerk the pin up by raising the pin lifting lever and let the car go. When I stepped down off this car, I did not notice just where I was stepping, and so stepped in between the west switch tie and the switch rod, or what I call the bridle, of the first switch west of the Wolf Road viaduct on the north side of the track, or switch 35 I believe."

Did you tell him that?

A. I don't remember that. My leg was swelled up, and I was in awful pain when he was there. I don't remember that.

Q. Did you tell him this:

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"I did not slip, trip, stumble, fall, or any thing of that sort."?

A. I did not.

Q. Just a minute. Let me finish.

79 "I just did not look where I was stepping and stepped in between the tie and bridle."

A. No, sir.

Q. Then did you tell him this:

"There was nothing wrong with any of the equipment that had anything to do with this accident."?

A. I told him that, that I could see. I ain't no car inspector.

Q. Did you tell him this:

"The cars were properly handled on proper signals."?

A. Yes, sir.

Q. And did you tell him this:

"I had worked in this yard a dozen times or so and was familiar with conditions."?

A. No, sir, I did not tell him that.

Q. Referring to this statement that you signed on November 15, 1944, did you make this statement to the man from the Claim Department:

"The reason I got on the car was because I thought they were kicking the cars pretty hard and I did not want to run through switches and chance stumbling."?

80 A. No, sir, I did not.

Q. What was the reason why you got on the car?

A. If you switch those three or four hundred cars out there a day, it gets pretty hot and tiresome, and it is more convenient, you are safer, on the side of the cars than you are running alongside.

Q. How far would you have to run alongside of a car when the slack was in to uncouple the car?

A. Maybe two or three steps, and if that pin drops back, maybe you will have to run ten or twelve more. These pins drop back some times, you have to wait to see whether the pin is going to stay there or not.

Q. The reason you got on, then, was to avoid taking two or three steps alongside of the cars?

A. The least exertion, yes, sir.

Q. Did you also tell this man on November 15, 1944:

"I got on the car also because kicking them the way they were there was not much slack in the cars and that makes it hard to pull the pin running along beside the train."?

A. No, sir, I did not.
Q. Did you tell him:
"I rode the cars about a switch and a half, or about 60 or 70 feet."?
81 A. No, sir.
Q. That is a fact, isn't it, you rode that 60 or 70 feet?
A. About that, yes.
Q. But you are sure you did not tell this man you rode it that distance?
A. Not 60 or 70 feet. I wouldn't say I rode it 60 or 70 feet. I rode it about a car length.
Q. In feet, how far would you say that was?
A. 40 or 50 feet.
Q. Did you also tell him this:
"I would judge the train was moving 4 or 5 miles per hour when I got on and about 6 or 7 miles per hour when I got off."?
A. No, sir.
Q. Did you tell him this:
"The car was a gondola car and there was a platform on the end of car ahead of the box part and it was an old-timer. The pin lifter was about 3 and a half feet from where I hung on the ladder."?
Did you tell him that?
A. I said I had to reach like that from where I was at. Yes, I told him that.
Q. You told him what I have just read?
82 A. I never told him three and a half feet, but the way I had to get hold of the grab iron, it would take my full reach.
Q. Which hand did you have on the grab iron?
A. My left hand.
Q. And your right hand was reaching from over to the right of the pin lifter, was it?
A. Back.
Q. As you were in that position, you could not see the coupler, could you?
A. Yes.
Q. Were you peeking around the corner of the car, and could see the coupler, then?
A. Why, certainly.
Q. Did you tell him this:
"This is further away than usual and I could not pull

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it because I did not have sufficient leverage stretched out as I was to pull out and up on the pin and hang on at the same time."?

A. No, sir.

Q. You did not tell him that?

A. No, sir.

Q. Then did you tell him this:

"There was nothing wrong with the pin lifter, as
83 soon as I got off I pulled it all right and it operated properly."?

A. No, sir.

Q. You did not tell him that?

A. No, sir.

Q. But you did sign this, didn't you?

A. Yes, sir.

Q. And you did write on it: "I have read this and is true to the best of my knowledge."?

A. Yes, sir.

Q. Now, did you tell him this:

"I do not know what the car number was but do know that the pin lifter operated all right when I got off and pulled it."?

A. When I fell, it already come.

Q. I am asking you, did you tell this man when you got off and went on the side of the car, on the ground, that the pin lifter operated properly?

A. Not without any effort. I didn't.

Q. I would like to know now whether you told the man from the Claim Deuartment these words I am now reading:

"I do not know what the car number was but do know that the pin lifter operated all right when I got off
84 and pulled it."?

A. No, sir, I did not tell him that.

Q. Did you tell him this:

"I did not see the switch before I stepped on it because I was watching the conductor, I thought I could make it but slipped with my foot on the switch."?

A. No, sir.

Q. When did you first go to work for the North Western?

A. Christmas Eve, 1943.

Q. Did you work continuously for the North Western from the time you went to work until the time you were hurt?

A. The board slowed up in May, I think it was, 1944, and I asked them for a leave of absence, they hadn't called me for several days.

Q. Did you resign from the service at that time?

A. They told me I would have to resign.

Q. You did resign from the service?

A. Yes.

Q. And you went to work for another company?

A. Yes.

Q. Prior to the time you went to work for the North Western, I believe you stated on direct examination
85 you never had done any railroading work before?

A. No, sir.

Q. Back years before, for three years, you had worked for the Old Ben Coal Company at Johnston City ?

A. Yes, sir.

Q. Following that, you worked for a period of eight years as a mess attendant at the Hines Hospital?

A. About nine years.

Q. And you worked as a mess attendant during that time, did you?

A. Yes, sir.

Q. You lived there, and got your room and board?

A. No, sir.

Q. How much were you making when you worked for Hines?

A. $95.00 a month.

Q. Following that, who did you go to work for?

A. Freevol-Smedberg.

Q. Was it about that time when you were on WPA?

A. Well, yes.

Q. Did you go from Hines to WPA?

A. Yes.

Q. And you made about a hundred dollars a month on WPA?

A. I done other work, and made a little bit better.
86 Q. About how much?

A. I was doing landscaping work for people.

Q. About how much would you say you made while you were on WPA?

A. With WPA, and it?

Q. Both.

A. About two hundred a month, then.

Q. Two hundred a month?

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A. Yes. I was working out of the State Employment, at Forest Park.

Q. And do you remember a depositon you gave in my office, when I asked you about what you made before you went to work for the Chicago & North Western—or at Mr. Irwin's office, it was?

A. Yes, sir.

Q. Didn't you tell me at that time you made a hundred dollars a month, working for WPA?

A. I don't remember that.

Q. Isn't it a fact that it was a hundred dollars a month you made for WPA?

A. No, sir.

Q. Leaving out any other employment, the amount you drew from WPA was a hundred dollars, wasn't it?

A. No, sir. About fifty-five.

87 Q. Fifty-five?

A. Yes, sir.

Q. All right. Did you work for the Theoll Manufacturing Company?

A. Yes, sir.

Q. During what period did you work for them?

A. I don't remember. It was back in 1940, or '39—about '40.

Q. About how long did you work for them?

A. About seven or eight months, I guess.

Q. What job were you doing then?

A. Janitor.

Q. How much were you making then?

A. I think 57 cents an hour.

Q. Following that, who was the next one you went to work for?

A. I think it was Freevol-Smedberg.

Q. Isn't that the company you went to work for when you resigned from service, from the Chicago & North Western?

A. Yes, but I think that was the same one I worked for before.

Q. You were working as a building laborer for them?

A. Yes, sir.

88 Q. How much were you making, working for them?

A. $1.10 an hour.

Q. About how much did that run a month?

A. That depends. During the war, there was a lot of overtime.

Q. Do you have any recollection as to how much a month you made when you worked for them?

A. No, I don't.

Q. Then you went to work for the Easton Company, as a laborer?

A. Yes, sir.

Q. Then as a laborer for Emil Anderson?

A. Yes, sir.

Q. These were all before you went to work for the Chicago & North Western?

A. Yes.

Q. When you went to work for the Chicago & North Western, it was about $275.00 a month you were making, wasn't it?

A. I don't know. I had been getting better, but it might have slid down for the last month.

Q. You resigned from the service because you didn't think you were having enough work as a railroad man, isn't that right? You quit the service after you started
89 for the North Western, and went to work for somebody else?

A. Yes, sir.

Q. Do you remember who you went to work for?

A. Freevol-Smedberg.

Q. And did you receive an injury at that time?

A. I did.

Q. At that time, did you file a claim?

A. I did.

Q. And what was your earning for the year before you went to work for Freevol-Smedberg?

A. I don't remember.

Q. Can you give me any idea about how much you were making before you went to work for that company?

A. No, I can't.

Q. Do you remember filing an application for adjustment of claim before the Illinois Industrial Commission?

A. Yes, sir.

Q. I would like to have you take a look at this application for adjustment of claim, and the second page, and tell me whether this bears your signature at the bottom?

A. Yes, sir.

Q. Did you sign the original of that?

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90 A. Yes, sir.

Q. I want to refer you to the first page on this, toward the bottom, the answer to question "(f)". Do you want a drink of water?

A. Can I eat a cough drop?

Q. Yes, go ahead.

A. This will be all right.

Q. I will read this question, and then you can wait a minute, I think they are going to get a glass of water.

"(f) Earnings of employee during year preceding injury, if employed by the same employer; if not so employed give earnings of such employees in the same class or grade"

And the figure "$2,931.41".

Is that about what you made for the year before you went to work for the Chicago & North Western?

A. That is about it.

Q. I show you document marked Defendant's Exhibit 2 for identification, which shows earnings from the Chicago & North Western from the time you started in until the last time you worked for them. Will you look at that in the right-hand column, and state whether that shows earn-

91 ings that you made while you were with the Chicago & North Western? (Handing document to the witness.)

A. To my best recollection, that is about right.

Q. You were paid twice a month, for the North Western. were you?

A. Yes, sir.

Q. You came back to work for the North Western after you resigned from service, and worked from May 8, 1944, to July 25, 1944; did you not?

A. Yes, sir.

Q. That was the date of the accident. Then you were out of the service until November 1st, 1944?

A. Some time in November. I don't know. My leg was paining me.

Q. You returned to work on November 1st, 1944, and worked until you had this other accident on February 3, 1945, didn't you?

A. No, sir.

Q. Along in November, December and January,—in December and January, you were making as much for the Chicago & North Western as you had made at any other time, weren't you?

A. When?

Q. In December and January, following your acci-
92 dent, you went back and worked full-time as a switchman, and overtime shifts, and all that, didn't you?
A. No, sir, I didn't work overtime.
Q. In December, 1944, for the first half, didn't you make $140.66?
A. That was straight time. That was for two weeks.
Q. That was for two weeks, wasn't it?
A. That was for road service.
Q. You worked full-time on road service following this accident?
A. Yes.
Q. And you did that up until the time you got hurt on February 3rd?
A. From December?
Q. Yes.
A. Part of the time I was out of service several times, they pulled me out of service several times.
Q. Whatever your earnings were, they are shown on there?
A. That is about correct.
Q. In this other accident, did you hurt the same leg again?
A. Yes, sir.
Q. You went to what doctor, then?
93 A. Dr. Joslyn.
Q. When did you next go back to work?
A. I didn't go back to work.
Q. You went to work for Buick, didn't you?
A. Yes.
Q. Was that about a month later?
A. Yes.
Q. And you worked as a yard laborer then?
A. No.
Q. What work did you do for Buick?
A. I was working inside the shop, cleaning up the carpenter shop, and such as that.
Q. I am sorry, I couldn't hear you.
A. I was cleaning up the carpenter shop.
Q. Sort of janitor work, was it?
A. Yes.
Q. And you worked there for over a month, did you not?
A. About five weeks.

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Q. And the reason you quit there was because you were laid off?

A. Yes.

Q. And the next company you went to work for was Douglas Company. Did you do about the same kind of work there?

94 A. No.

Q. What did you do there?

A. A lot of it was assembling, bench work, and spraying.

Q. Did you make about $200.00 a month working for Douglas Company?

A. When they put me on overtime, yes.

Q. Were you averaging about $200.00 a month when you worked for Douglas?

A. Yes, finally.

Q. What is that?

A. Along at the last, yes.

Q. You worked for Douglas from April 21, 1945, to September 12, 1945, didn't you?

A. April to September?

Q. Yes.

A. About that.

Q. You were not fired from Douglas, were you?

A. Laid off.

Q. You were laid off on account of reduction in force and shutting down the war plant, is that right?

A. Yes.

Q. You next worked for the Westward Ho Golf Course?

A. Yes, sir.

95 Q. You were on your feet all the time doing that, weren't you?

A. No, sir.

Q. What were your duties at Westward Ho Golf Club?

A. Cutting grass with a power mower, and building tees, laying sod.

Q. How many hours a day did you work?

A. Eight hours.

Q. You worked there for several months, didn't you?

A. No, sir.

Q. You started on September 12, 1945?

A. Somewhere around there.

Q. And when did you quit work?

A. I got fired.

Q. When was the last time you worked for Westward Ho?

A. In November, I think.

Q. After that you went to work for the Jefferson Electric Company, didn't you?

A. Yes.

Q. And you worked for that company up until the time this case was tried the first time here in this courtroom, didn't you?

A. Yes, sir.

Q. In working for Jefferson Electric Company,
96 what was your job, what did you do?

A. Stockman for the packers, and one thing and another.

Q. Were you lifting boxes around?

A. Sometimes.

Q. And shoving dollies, and hand carts, and things like that?

A. Sometimes, with help.

Q. Since the accident you have told us about going to see Dr. Hills, and you say Dr. Cutter. Did you also see Dr. Larmon?

A. I seen him at the dispensary, but he never talked to me; and I seen him at the Passavant Hospital, and he never talked to me, or treated me.

Q. He examined you, didn't he?

A. He did not.

Q. Did your lawyer send you to some doctor?

A. Yes, sir.

Q. Who did Mr. Irwin send you to?

A. I don't know what his name is.

Q. Is he the man that testified here before?

A. Yes, sir.

Q. Would that be Dr. Zeitlin?

A. It might be. I don't know.

97 Q. Is Mr. Kraman, the man who is here with Mr. Irwin, is he the one who took you over to Dr. Zeitlin's office?

A. Yes.

Q. When did you see Dr. Zeitlin for the first time?

A. I don't remember.

Q. Was it after you hired Mr. Irwin to bring your suit for you?

A. Yes.

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Q. That was some time before the first trial, wasn't it?

A. Yes.

Q. Several months before it?

A. No.

Q. Shortly before the first trial?

A. I don't know. He sent me to two doctors. I don't know them apart.

Q. Neither of those doctors treated you, did they?

A. No, sir.

Q. They just came over here to court to testify, is that right?

A. There was some three or four months, one of them, before the trial. One of them. I could pick them out.

Q. Would you recognize Dr. Zeitlin if you saw him?

A. Yes.

98 Q. Is he a tall man, dark complexioned, with a mustache?

A. Both of them was pretty good size. If I could see them, I would pick them out.

Q. Did you have X-ray pictures taken in both places?

A. No.

Q. Only one man took X-ray pictures of you, is that right?

A. That is right.

Q. Wasn't that Dr. Zeitlin that took the X-ray pictures?

A. I couldn't swear to his name.

Q. Did the man who took X-ray pictures of you, that doctor, did he testify here in court

A. He did.

Q. And did he make an examination of you?

A. He did not, only after that, before I went to trial. At the time of the X-ray, he didn't examine me.

Q. And at the time of the trial he examined you out in the hall, isn't that right?

A. Yes, sir.

Q. Did he examine you at any time beside the time he examined you out in the hall?

A. No, sir.

99 Q. Have you seen the same doctor who examined you out in the hall, and who took the X-ray pictures, have you seen him since that time?

A. No.

Q. The other doctor's name was Dr. Aries, wasn't it?

A. I don't know his name.
Q. Did you see him shortly before the first trial?
A. Yes, sir.
Q. Did you see him more than once?
A. No, sir.
Q. And have you seen him since your first trial?
A. No, sir.
Q. Since the first trial, have you been to see any doctor at all?
A. Yes, sir.
Q. Who did you go to?
A. A doctor in Maywood. I forget his name.
Q. Joslyn?
A. No.
Q. Who sent you to the doctor in Maywood?
A. I went of my own free will.
Q. When did you go to see this doctor?
A. A week or ten days ago.
Q. Did he treat you at that time?
100 A. No.
Q. He simply examined you, did he?
A. Yes.
Q. Have you any idea what his name is?
A. Not right now, I don't.
Q. Did you tell your lawyer you had been to see him?
A. No.
Q. Have you had any treatment for your foot recently?
A. No, sir.
Q. Are you wearing any kind of a special shoe?
A. Yes, sir.
Q. Is that shoe built up?
A. Well, I don't know. They say it is a Thomas heel.
Q. They call it a Thomas heel, is that right?
A. That is what they tell me.
Q. Do you remember that on the previous trial you were asked about your left foot, and do you remember that your lawyer, Mr. Irwin, asked you this question:
"Q. And what about the position of your foot?
"A. Well, I don't notice any difference in it."?
Do you remember he asked you that question, and you made that answer?
A. I don't. I don't remember.
Q. Do you remember being asked about the posi-
101 tion of your foot at the last trial?
A. No, I don't.

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Q. What about the position of your foot? How is your foot turned now? It is the left foot you are referring to now, isn't it?

A. I ain't no doctor, I can't tell how it is, but there is a strain here on the outside.

Q. On the outside of the foot, is that it?

A. On the outside of the foot.

Q. Where is the heel built up on that shoe?

A. On the inside.

Q. Is your foot painful all the time?

A. All the time.

Q. And you walk with a limp, do you?

A. Yes, sir.

Q. You walk with a limp all the time as you get around, do you?

A. Yes, sir.

Q. And when you worked there at the Jefferson Electric Company, did you walk with a limp at that time, while you were doing your work?

A. I did.

Q. Is your foot painful all the time regardless of how much you use it?

102 A. Yes, sir.

Q. Do you remember that this question was asked you by Mr. Irwin, and you made this answer:

"Q. Does it swell all the time, or just part of the time?

"A. Well, if I sit around and ain't on my feet, why I don't notice it so much, but if I try to do something you know in excess like what you would call hard work, why it is painful."?

Was that question asked you, and did you make that answer?

A. I don't remember the question.

Q. Is it a fact if you sit around, and are not on your feet much, it doesn't bother you?

A. I might get up here now, and start to take a step, and fall over on my face. I don't know when it is going to bother me.

Q. If you do not use it much, it doesn't bother you, does it?

A. Sometimes it does, and sometimes it don't.

Q. Do you use a cane?

A. Not for some time.

Q. When is the last time you used a cane?

A. About six or eight weeks ago.

103 Q. Were you using a cane up until that time?

A. Not all the time. I fell and hurt it again. I fell in July.

Q. What were you doing at the time that you fell?

A. I was catching a bus, I stepped on a rock.

Q. Did you make a recovery from the injury you sustained at that time?

A. Yes. I just wrenched it.

Q. I am sorry, I can't hear you.

A. It seemed like it was just wrenched.

Q. It is all right as far as that wrench is concerned, is it?

A. I can walk without a cane now.

Q. How long did you use a cane at the time you were injured getting off a bus?

A. Three or four days. I never got on the bus.

By Mr. Slater: That is all of my cross-examination.

By Mr. Irwin: I think that is all.

I suppose you will offer this in evidence during your case, will you?

By Mr. Slater: Yes.

By Mr. Irwin: All right. It is too late, I guess, to get anybody at this time.

104 By the Court: We are going to adjourn at 3:45.

By Mr. Irwin: Yes. About the doctors, in the morning I can get Dr. Aries, tomorrow morning, and I cannot get him any other time. And I cannot get Dr. Zeitlin until afternoon. He is at the hospital, and he has engagements that I would not feel justified in asking him to break. The X-ray pictures, I will have to have them identified for Dr. Aries. Will you agree?

By Mr. Slater: Yes, I will agree to those X-ray pictures. I believe you have all of them, haven't you, from the preceding trial?

By Mr. Irwin: Yes, I think so.

By Mr. Slater: All right. I raise no point about the authenticity of the X-ray pictures.

By Mr. Irwin: May we put Dr. Aries on, and then when Dr. Zeitlin comes, in your case, in the afternoon, may we put him on?

By Mr. Slater: I think that is all right.

By the Court: We will recess at this time, ladies and gentlemen, until 10:00 o'clock tomorrow morning.

(Whereupon the jury retired from the courtroom, and

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the following proceedings were had outside the presence of the jury:)

105 By Mr. Slater: May I ask one thing about this case? There are three counts. Two of them were dismissed at the last trial. I presume they are still out as far as this case is concerned, aren't they?

By Mr. Irwin: I presume they are.

By Mr. Slater: I gathered from your statements to the jury, and during the course of the trial—I did not know what to gather from that.

By Mr. Irwin: They are out.

By the Court: I guess you could not very well amend now, could you?

By Mr. Irwin: I could have before trial. I suppose he would say he was surprised, if I amended them now.

By the Court: At any rate, they are out now.

By Mr. Slater: Yes. I just wanted to get that clear.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. of the following day, Wednesday, October 9, 1946.)

106 Wednesday, October 9, 1946,
10:00 o'clock a.m.

Court convened pursuant to adjournment.

Present:

Mr. Irwin.

Mr. Slater.

(The following proceedings took place before the jury entered the courtroom:)

By the Court: Bring in the jury.

By Mr. Slater: As I understand it, your Honor, Mr. Irwin still has two witnesses, but I am to proceed with my case at this time, and I therefore will reserve making my motion until after he puts on his witnesses.

By Mr. Irwin: That is all right.

By the Court: All right.

107 (Whereupon the jury entered the jury box.)

By the Court: You may proceed.

And thereupon the Defendant, to maintain the issues on its part, introduced the following evidence, to-wit:

By Mr. Slater: I have some exhibits here that I would like to offer and read to the jury from. The first is Defendant's Exhibit No. 2, which is a list of earnings. Any objection to this?

By Mr. Irwin: No. If you say that is right, I have no objection.

(Said document, so offered and received in evidence, was marked DEFENDANT'S EXHIBIT 2.)

By Mr. Slater: I have the net earnings from the period December 1943 to February 1945, and, in all, from the first to the last, there are two checks per month, paid twice a month, except the first entry, December 1943, when there was one check for $72.19.

	January 1944,	$129.33,	$139.47.
	February 1944,	$152.34,	$147.20.
108	March 1944,	$149.15,	$153.44.
	April 1944,	$142.85,	$ 81.19.
	May 1944,	$ 74.94,	$126.31.

By Mr. Irwin: May I interrupt you just a moment, Mr. Slater?

By Mr. Slater: Yes.

By Mr. Irwin: Are those the gross earnings, or are those after deductions?

By Mr. Slater: Income tax and railroad retirement tax have been deducted.

By Mr. Irwin: After they have been deducted?

By Mr. Slater: Yes.

By Mr. Irwin: Do you have the gross earnings?

By Mr. Slater: Yes, I have those on the same page.

By Mr. Irwin: Suppose you read those at the same time?

By Mr. Slater: This is in evidence, and I suggest, if you want those in, you read them.

By Mr. Irwin: I agreed you could read it, but the man's earnings are what he earns, whether he pays taxes, or something else. It is gross earnings, and that it what I agreed to.

By Mr. Slater: In order to save time, suppose I
109 read just the dollars.

By Mr. Irwin: That is all right. But the gross earnings is what he is entitled to.

By Mr. Slater: I will read the net earnings, and then I will proceed to read the gross earnings.

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By Mr. Irwin: That means the gross earnings before deduction for social security, income tax, and things of that kind.

By Mr. Slater: There are two items, railroad retirement tax and income tax, and there were miscellaneous items in the amount of $15.00 deducted at various times.

June 1944	$153	$162
July 1944	$155	$ 95
August 1944	$ 12	
October 1944	$ 6	
November 1944	$ 68	$ 58
December 1944	$140	$135
January 1945	$112	$196
February 1945	$ 46	

Now I will read the total amount earned before deduction for railroad retirement tax, income tax, and these miscellaneous items that total $15.00.

110 —Documentary—

December 1943	$ 79	
January 1944	$148	$162
February 1944	$176	$169
March 1944	$173	$175
April 1944	$166	$ 86
May 1944	$ 78	$138
June 1944	$174	$186
July 1944	$176	$103
August 1944	$ 12	
October 1944	$ 7	
November 1944	$ 72	$ 62
December 1944	$159	$151
January 1945	$149	$241
February 1945	$ 48	

I would now like to offer in evidence application for adjustment of claim, marked Defendant's Exhibit 3-A.

(Said document, so offered and received in evidence, was marked DEFENDANT'S EXHIBIT 3-A.)

By Mr. Slater: I would like to read from this application for adjustment of claim that was filed with the Industrial Commission of Illinois, September 7, 1944:

111 Documentary

"Alfred S. Penn
vs.
Freevol-Smedberg Co. } No. 348124.

"The petition of the undersigned respectfully shows to this Honorable Commission the following, to-wit:

"That on the 1st day of May, 1944, Alfred S. Penn was injured by reason of an accident arising out of and in the course of his employment by the above named Freevol-Smedberg Co.;".

It then recites there is a dispute to be settled by the Industrial Commission, and "(d)", under Paragraph 3:

"Nature of work upon which injured was engaged at time of accident and how caused. Carrying and lowering a concrete form.

"(e) State whether medical, surgical and hospital treatment was furnished by employer and, if so, to what extent; amount expended for above purposes and period treated. 3 or 4 treatments by Dr. Gray, 4353 West North Ave. Chicago.

"(f) Earnings of employee during year preced-
112 ing injury, if employed by the same employer; if not so employed give earnings of such employees in the same class or grade. $2,931.43."

I would like to offer in evidence a document which is marked Defendant's Exhibit 3, which is the accident report signed by Mr. Penn, dated July 25, 1944, known as the 148 report.

By Mr. Irwin: All right.

(Said document, so offered and received in evidence, was marked DEFENDANT'S EXHIBIT 3.)

By Mr. Slater: I would like to read from this.

"1. Name of injured person A. S. Penn
Employe? Brakeman Age 47."

It gives his address.

"6. Place of accident Yard 8 lead 35 switch Proviso.
Date July 25, 1944. Hour 12 Noon."

"7. Weather: Daylight Yes." "Clear Yes."

"8. Describe fully how accident occurred:

I was pulling pins and Conductor give a cut sign and train was going a little fast and I got off to pull a pin

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and I stepped in Track 35 switch and caught my heel in between switch rod and tie and turned my left ankle."

113 "16. What does injured person say was cause of accident? Stepped in between switch rod and tie while pulling pins."

I would like to offer in evidence Defendant's Exhibit 4, which is the narrative typewritten statement, dated July 28, 1944. Any objection?

By Mr. Irwin: No.

(Said document, so offered and received in evidence, was marked DEFENDANT'S EXHIBIT 4.)

By Mr. Slater: I would like to read from this statement, which is signed by Mr. Alfred S. Penn. Over his signature appears this writing: "I have read this statement which is true."

"Alfred S. Penn says in relation to an accident sustained by him in yard 8 at Proviso, Illinois, at about 12:15 P. M. July 25, 1944."

In the third paragraph:

* * * "From my position on this car I had tried to pull the pin, but it did not raise. So I was going to get off on the ground and run along with the car, jerk the pin up by raising the pin lifting lever and let the car go.

114 When I stepped down off this car, I did not notice just where I was stepping, and so stepped in between the west switch tie and the switch rod, or what I call the bridle, of the first switch west of the Wolf Road viaduct on the north side of the track, or switch 35 I believe. I caught my foot, the left one, between the west tie and the rod but I did not fall over. In a short time I went to the office and Ernie the clerk took me to Dr. Hills at the Elmhurst Hospital. When I stepped off this car, I was looking towards the east or down the lead.

"I did not slip, trip, stumble, fall, or any thing of that sort. I just did not look where I was stepping and stepped in between the tie and bridle. I was not interfered with by any one else or any other cars.

"There was nothing wrong with any of the equipment that had any thing to do with this accident. The ground around the switch tie was in normal condition. It was level and in good condition. The space between these ties had been cleaned out the day before. The switch was set for the lead.

115 "It was my job to pull the pin on this car, which I was trying to do at the time. The cars were properly handled on proper signals.

"I had worked in this yard a dozen times or so and was familiar with conditions."

I would like also to offer in evidence a narrative form statement, dated November 15, 1944, signed by Alfred S. Penn, above which is written, in longhand: "I have read this and is true to best of my knowledge." I offer that as Defendant's Exhibit 5.

By Mr. Irwin: Of course, it is understood that the entire document can be read in.

By Mr. Slater: If you desire to read any other portion of it, I have no objection.

By Mr. Irwin: That is, the whole document is in evidence?

By Mr. Slater: That is right.

(Said document, so offered and received in evidence, was marked DEFENDANT'S EXHIBIT 5.)

By Mr. Slater: This is a statement dated November 15, 1944:

116 "Alfred S. Penn, says in addition to his statement of July 28, 1944, concerning his accident of July 25, 1944 at Proviso, Ill.

"In regard to the speed of the movement of these cars at the time of the accident. In my original statement I said that the speed of the cars was about 10 miles per hour, perhaps I exaggerated that a little, after all I just judged the speed. I would correct that to read from 6 to 7 miles per hour. I would say that proper switching speed is 6 to 7 miles per hour."

Then, in the third paragraph:

"The reason I got on the car was because I thought they were kicking the cars pretty hard and I did not want to run through switches and chance stumbling. I got on the car also because kicking them the way they were there was not much slack in the cars and that makes it hard to pull the pin running along beside the train. I rode the cars about a switch and a half, or about 60 or 70 feet. I rode it that far because that was how far I was away from the place where I wanted to cut this car off."

Then in the fourth paragraph:

117 "The cars were picking up speed when I got on, that is one reason I got on and rode so I could ride past the

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switches and not run over them. I would judge the train was moving 4 or 5 miles per hour when I got on and about 6 or 7 miles per hour when I got off.

"The car was a gondola car and there was a platform on the end of car ahead of the box part and it was an old timer. The pin lifter was about 3 and a half feet from where I hung on the ladder. This is further away than usual and I could not pull it because I did not have sufficient leverage stretched out as I was to pull out and up on the pin and hang on at the same time. There was nothing wrong with the pin lifter, as soon as I got off I pulled it all right and it operated properly. I do not know what the car number was but do know that the pin lifter operated all right when I got off and pulled it."

I would like to offer in evidence photographs marked Defendant's Exhibits 6, 6-A, 7, 8, and 9.

By Mr. Irwin: I object to these pictures, because it has not been shown what kind of a coupler was on the
118 car in question. It is not shown that the device, the lifting rod or pin, or any part of that device, was anything like the car in question.

By Mr. Slater: I submit I asked Mr. Penn about that, and showed him the photographs, and he said the only difference between this and the kind of a car he was on was that the brake platform on the east end of the gondola car that he was handling was about 18 inches wide, and he thought the one shown in this picture is narrower.

I do not pretend this is the precise car, but it is for demonstrative purposes, to demonstrate to the jury what a pin lifter and coupler look like.

By Mr. Irwin: You did not ask him anything about the pin lifter or lifting rod or any part of it, whether it looked different, or what kind it was, or anything of that sort. There is no evidence.

By the Court: Sustained.

By Mr. Slater: Do you have any objections to Defendant's Exhibits 7, 8, and 9?

By Mr. Irwin: Those are photographs of the yard?

By Mr. Slater: Yes, and the switch.

By Mr. Irwin: Those are all right.

119 (Said photographs, so offered and received in evidence, were marked DEFENDANT'S EXHIBIT 7, 8, and 9, respectively.)

By Mr. Slater: At this time, I would like to pass these to the jury.

By the Court: Very well.

(Mr. Slater handing photographs to the jury. Short interruption.)

By Mr. Slater: I would like to call Mr. Penn to the stand for a minute.

120 ALFRED S. PENN, the plaintiff herein, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination by Mr. Slater (Continued).

Q. Mr. Penn, will you take a look at this photograph that is marked Defendant's Exhibit 6 and will you look at the coupler or drawbar on this picture? Does that show the kind of a coupler that was on the car that you were operating on?

A. Well, similar to that.

Q. It is similar, is it?

A. Yes.

Q. And how about the pin lifter and pin handle, was the one on the car on which you were riding similar to the one in that picture?

A. It was pulled up here, but, as far as I can remember, I think it was just one over here (indicating), it didn't have this (indicating).

By Mr. Irwin: It didn't have what?

By Mr. Slater:

Q. Go ahead.

A. It was a little different than that there. It was direct, as far as I remember, to the best of my knowledge.

121 Q. Let me ask you about this. You see the handle of the pin lifter in this picture, Defendant's Exhibit 6-A?

A. I do.

Q. Was it the same kind of handle on the pin lifter that you had on the day in question?

A. Yes, sir.

Q. Is the rod that goes from the handle over toward the drawbar the same?

A. There is a difference in them there. A man don't notice every one of them. There is a difference in every one of them. Some goes in it direct. This is different.

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Q. Do you remember specifically on the one you had that day just how the end of the pin lifter was as it got over to a point near the coupler?

A. No, I don't.

Q. As far as you can remember, the one you saw on that day, does that show substantially the same thing?

A. It shows this part of it (indicating).

Q. And about the other, you don't know, is that it?

A. I couldn't swear to it.

Q. When you refer to "this," and "that," you mean the handle, do you?

A. Yes, the handle, the pull-up handle.

122 Q. And the pin lifter, as it runs from the handle over to the coupler, is that the same?

A. This way, yes; but they vary in here (indicating).

Q. You do not say this varies from the one in question? You simply did not see that one on that day?

A. Well, I seen it, but I wouldn't swear to it. There are three or four different kinds.

By Mr. Slater: I again offer this photograph as showing substantially what a pin lifter is, and the handle, and, as far as he could tell, this shows the same type of thing. It is for demonstrative purposes. I admit it is not the precise thing, but it is as near as we have.

By Mr. Irwin: Let me ask a couple of questions.

By Mr. Irwin:

Q. How many different kinds of couplers are there?

A. Several, four or five; some underslung, some works from the top, and some a lever you push down.

Q. Does the locking block in all of the couplers work the same?

A. I never went in that. My experience wouldn't let me testify to that. I have seen them pull up.

Q. Do you know what kind of a coupler was on the car in question, the one that you got hurt on?

123 A. It was one that comes up.

Q. Do you know the make?

A. No.

Q. Do you know the make of the coupler shown in this photograph?

A. I do not.

By Mr. Irwin: I object to that, your Honor.

By the Court: Sustained.

By Mr. Slater: You may step down, Mr. Penn.

(Witness excused.)

124 RAYMOND P. KLASEN, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Slater.

Q. Please state your name.
A. Raymond P. Klasen.
Q. Where do you live?
A. 701 South Second Avenue, Maywood, Illinois.
Q. Are you employed by the Chicago & North Western Railroad?
A. Yes, sir.
Q. How long have you worked for that railroad company?
A. Twenty-six and one half years.
Q. What sort of work have you done during that period for the company?
A. Yard clerk, brakeman, switchman, and yard master.
Q. And have you had experience in switching cars in the yards, and also handling freight cars over runs on the road?
A. Yes, sir, I have.
Q. What is your capacity with the company at the present time?
125 A. Yard master.
Q. In what yard are you employed?
A. Proviso Yard.
Q. Is there any number to the yard in which you work?
A. Yard No. 8.
Q. How long have you been yard master in Yard No. 8?
A. About seven or eight years.
Q. What are your duties as yard master?
A. To supervise all switching movements in that yard, making up of trains.
Q. Are you familiar with the coupling and uncoupling of cars there in Yard 8 at Proviso?
A. Yes, sir.
Q. Can you tell the Court and jury just what the mechanism is on coupling cars together, how is that handled?
A. There is a drawbar or a coupler in the end of each car, and they are coupled together by bringing the cars together, and there is a knuckle in each one of these drawbars.

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Q. Let me ask you about a drawbar, first. What sort of an object does a drawbar look like? What are its dimensions, for instance?

A. It is about three or three and a half feet long.

126 Q. And about how high is it?

A. It is about—well, the head of it is about 16 inches high.

Q. And how wide is it?

A. And about 12 inches wide.

Q. Is there one on each end of a freight car, or box car?

A. Each car has one on each end.

Q. And where is it with reference to the end of the car?

A. Right in the center.

Q. Is it under the body of the box car?

A. Yes, sir.

Q. Now, at the far end of the coupler, is that where the knuckle is?

A. Yes, sir.

Q. And can you describe what does the knuckle look like, what sort of an object is it?

A. It is just about like that (indicating).

Q. Like your hand cupped, is it?

A. Yes, it opens and closes. There is a device in there, a pin and a locking block, and when the pin is down that holds it closed; and when the pin is up, it opens it.

127 Q. Do the knuckles of the two freight cars that are coupled together, do they fit into each other?

A. Yes, sir, they do.

Q. Can you demonstrate to us how that is done?

A. Just about like you would couple your two hands.

Q. Where is the locking block when they are coupled together?

A. On the inside.

Q. Where does that extend, from what to what?

A. The locking block runs from the pin down into the coupler head, and that holds the coupler closed when the pin is down, and when the pin is up it opens the coupler.

Q. When the pin is lifted, what does that do to the locking block?

A. When you pull the pin up, it raises the locking block, and that releases the knuckle so it will open, you can uncouple the cars that way.

Q. There has been some mention of slack. What does that mean, slack, in freight cars?

A. It is what you would call the play, in between the drawbars they have about 6 inches of play there, they work back and forth.

Q. Is there a spring of some kind inside the drawbar?

A. There are springs in the back end of the drawbar.

128 Q. When the slack is out, what does that mean?

A. When the slack is out of the cars, when they are coupled together, that means they are tense, when they are pulled tight like that.

Q. When they are pulled tight like that, is it possible to lift the pin?

A. No, it is not.

Q. Then, in order to pull the pin, to lift the pin, what has to be the condition of the slack?

A. The slack has to be shoved in, so that it releases the tension.

Q. I will show you a model here, which I will refer to as Defendant's Exhibit 1. Have you seen this model before?

A. Yes, sir, I have.

Q. Can you step down?

By Mr. Slater: Do you have any objection, Mr. Irwin, to him using the model for demonstration purposes?

By Mr. Irwin: I do not know whether it is a model of the kind that was used, or not.

By Mr. Slater:

Q. Will you step down here?

By Mr. Irwin: If it is the model that was on the

129 car in question, all right; but if it wasn't a model of that particular coupler, I do object to it, unless it is shown to be exactly the same.

By Mr. Slater: I understood you to say, in your remarks to the jury, you hoped we would have a model here.

By Mr. Irwin: Of the coupler in question.

By Mr. Slater: You mean the precise the car?

By Mr. Irwin: Of course, they are all different. There are several different makes and kinds. They operate differently.

By Mr. Slater:

Q. Are you familiar with the different types of couplers?

A. Yes, sir.

Q. Do they work on the same principle, of having knuckles and a locking bar?

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A. Yes, sir, they do.

Q. And how about a pin, and pin lifter? Do freight cars have that?

A. They all have that.

Q. They all have that in common, do they?

A. They all have it.

Q. Is there any variation in the manner in which
130 the couplers themselves and knuckles work, the principle on which they work, on these various kinds of couplers?

A. They all work on the same principle.

Q. Are all the pin lifter handles exactly the same?

A. No, sir, they are not.

Q. What is the distinction in the handles themselves?

A. There are some that you can pull with your hand, and lift up, just like this model here; and then there is another handle that has a lever that comes across here, that you can shove down with your hand or your foot.

Q. Do all the couplers that operate with a pin lifter that pulls up, do they operate in the same way, and on the same principle?

A. Yes, sir.

Q. Does this model have a pin lifter which pulls up?

A. Yes, it does.

Q. Will you point out on the model where the handle of the pin lifter is?

A. (Witness indicating.)

Q. Will you point out where the rod connecting the handle to the pin itself is, on this model?

A. This part here (indicating).

Q. Will you point out where the pin is?

131 A. The pin is right down in here, connected to this rod (indicating).

Q. And where is what is known as the locking block?

A. The locking block is down in here (indicating).

Q. And is there such a locking block in this particular model?

A. Yes, there is.

Q. Will you tell me where the knuckle on this is?

A. This is the knuckle (indicating).

Q. Is that the knuckle on just one freight car, or is there another knuckle here?

A. This is the knuckle on one end of one freight car.

Q. This shows one drawbar complete, does it?

A. Yes, sir.

Q. When another drawbar and knuckle is put into juxtaposition with that, where does it fit in?

A. It is the same kind of apparatus, only it comes in, and couples right in here (indicating).

Q. When the slack is stretched out,will you demonstrate on that handle how the knuckle is, when the slack is stretched out?

A. When that knuckle is tense, it is being pulled in that position (indicating).

Q. When it is tense, and is being pulled in that
132 position, is it possible, on a freight car of that model, or any other model, to pull the pin up?

A. No, sir.

Q. Now, will you resume the stand again?

A. Yes, sir.

Q. One thing. Will you demonstrate how this model works on pulling the pin up? How do you pull the pin up?

A. (Indicating.)

Q. And then when it is closed, to close the knuckle again, how is that done?

A. (Witness indicating.)

Q. Will you stretch the slack out, and endeavor to pull the pin up?

By Mr. Irwin: I object to that, your Honor.

By Mr. Slater: I will withdraw the question. You may resume the stand.

By Mr. Slater:

Q. Do you know the plaintiff in this case, Alfred S. Penn?

A. Yes, sir, I do.

Q. Do you recall an accident that occurred on the 25th of July, 1944, in Yard 8, at Proviso?

A. Yes, sir.

Q. Were you on duty at that time?

133 A. I was.

Q. Do you remember about what time of day it happened?

A. Oh, right around noontime.

Q. Do you know what Penn was doing around that particular time, that is, as far as his duties were concerned? What was Penn's job on that day?

A. He was what is known as the headman on the job,

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and his duties were to uncouple the cars while they were being switched in on the classification tracks.

Q. You are familiar with the lead track there, in Yard 8, are you?

A. Yes, sir.

Q. Which direction does that run, generally?

A. It runs east and west.

Q. What do you call the tracks that the cars are put on from the lead track?

A. Classification tracks.

Q. Are there switches from the lead track that go into each of the classification tracks?

A. Yes, sir.

Q. What are the tracks that are in Yard 8, what are the numbers?

A. They number from Track 31 to 53, consecutively.

Q. Is 31 at the west end of these tracks?

134 A. Yes, at the west end.

Q. And is the switch at the west end?

A. At the west end of the lead.

Q. At Wolf Road, that is an overhead bridge, is it not?

A. Yes, sir.

Q. Do you know where switch 35 is?

A. Yes, sir.

Q. Where is that with reference to the overhead bridge at Wolf Road?

A. Just about even with the west end of the bridge, underneath the bridge.

Q. Were you in that vicinity when Mr. Penn met with an accident?

A. I had just stepped out of my office.

Q. Let me ask you, I didn't get to that. Where is your office with reference to switch 35?

A. About 250 feet east.

Q. And by which switch is your office, the nearest switch?

A. The nearest switch is switch 39.

Q. Is your office north of the lead track?

A. My office is north of the lead track.

Q. And about how far on a straight line is it from 135 your office to the lead track?

A. About 20 feet.

Q. When you came out of your office, about what time would you say it was, the time of this accident?

A. Around 12:00 o'clock.
Q. Was it a clear day then?
A. Yes, it was.
Q. The visibility was good, was it?
A. Yes.
Q. How far west could you see?
A. Oh, I could see to Elmhurst. That is about a mile and a half.
Q. Now, when you came out of the office, where did you go to?
A. I stepped out on the lead, and I looked up the lead.
Q. Which side of the lead were you on?
A. The north side.
Q. How close to the track itself were you, as you stood there?
A. To the lead track?
Q. Yes.
A. I was just opposite, about 5 feet.
Q. 5 feet north of the lead track?
A. 5 feet north of the lead track.
136 Q. Was there anybody else in the immediate vicinity?
A. Yes, sir, the conductor was there.
Q. What is his name?
A. Wescott.
Q. Do you know where the field man was that was working with that crew?
A. He was down east on the lead, about in the vicinity of Track 50.
Q. Do you know about the approximate distance from one switch to another along that lead track from, say, switch 31 to switch 52?
A. From switch 31 to switch 52?
Q. Make it the distance, say, from switch 33 to switch 39.
A. 33 to 39 would be, oh, around 350 feet.
Q. What I meant was, from one separate switch to the next, what is that distance?
A. About 70 feet, 65 or 70 feet.
Q. Will you tell us what you know of this accident that occurred as you were there by switch 39?
A. Just as I stepped out of my office, out on to the lead by switch 39, I looked up and I noticed Brakeman Penn stumbling.

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Q. Where did you see Brakeman Penn?

137 A. It was right at switch 35.

Q. Tell us the rest of it.

A. And he kind of stumbled, and went partially down on one knee, and then straightened up again, and hobbled over to a little bench that was just opposite switch 35, underneath Wolf Road viaduct. He sat down there, and I immediately walked up to him and asked him if he was hurt, and he says, "Well, I tripped, but I think I will be all right," and I says, "You think we had better examine it?" He said, "No, I think I will be all right." I said, "Well, come on down to the office."

So we walked down to my office, and when he got in there, he sat down on a bench, and I looked at his foot, and his ankle was swollen, so I says, "You will have to go up to the yard office and go to the doctor with that."

And I escorted him up to the yard office, the assistant superintendent's office.

Q. Where is that with reference to switch 39, where your office is?

A. That is west.

Q. Is it west of Wolf Road, too?

A. West of Wolf Road, about 100 feet or so.

Q. Then what was done with Mr. Penn after that?

138 A. I turned him over to a man in Mr. Cantwell's office, the assistant superintendent's office, and he took him to the doctor.

Q. Did you go to the doctor with him?

A. No, sir, I did not.

Q. One other thing about switching cars. What do you mean by kicking a car, the process?

A. When you kick a car, you give the engineer what is called a highball, a kick sign.

Q. Will you demonstrate what that sign is?

A. You give him a kick sign, that motion (indicating). That means you want him to move the engine in that direction. Then the cars are going in on different classification tracks, and the man that is up there pulling the pins, pulls the pins, and these cars are let roll down the lead, and there are men down the lead that throw the switches and put the cars on different tracks.

Q. In connection with kicking the cars, is there also a stop sign given?

A. When the conductor feels he has moved the cars

sufficiently, he gives a stop sign, then the car is detached from the other cars by the pin puller, and then let roll down in on the track.

Q. When the kick sign is given, what does the engi-
139 neer do, how does he respond to the kick sign?

A. The engineer opens his throttle and starts the movement of the engine, and kicks the cars until the conductor gives a stop sign, then he shuts off the throttle and applies the brakes.

Q. Each time a car is kicked, is it necessary to bring the train to a stop?

A. No, sir, it is not.

Q. Will you tell me what the condition of the slack is as cars are kicked in on this yard, from the time when the kick sign is given, then the throttle applied, then the brake put on, and then drifting? Will you tell me how the slack runs during that time?

A. When the engineer starts the cars moving, the slack is shoved in on all the drawbars in the cars, and that releases the tension of the pin, and the pin puller is able to lift the pin. And then when the engineer shuts the throttle off, and sets his brake, that stops the motion, and they come to a kind of a gradual stop, and this car with the pin lifted rolls away from the cut of cars.

Q. When that car rolls away, what is the condition of the slack in the other cars?

A. The slack is out.

140 Q. You cannot pull the pin at that time, can you?

A. No, sir.

Q. If the train is not brought to a complete dead stop, and continues to drift on, what is the condition of the slack during that period?

A. The slack is still out, as long as the engine has the brake applied.

Q. Then what is necessary to do to pull the pin?

A. The engineer must start the cars moving again, and shove the slack in on the cars.

Q. Had you seen Mr. Penn working along beside the car for these five or ten minutes immediately preceding this occurrence?

A. No, sir, I did not.

Q. Where had you been at that time?

A. I was in my office.

By Mr. Slater: I believe that is all. You may cross-examine.

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Cross-Examination by Mr. Irwin.

Q. You testified in this case once before, didn't you?
A. Yes, sir, I did.
Q. Is your memory better now than it was at that time?
A. About the same.
141 Q. You say now that you saw Mr. Penn falling, you saw him run alongside the car, and stumble; is that right?
A. When I saw Mr. Penn, he was in the act of stumbling.
Q. He was in the act of stumbling?
A. Yes, sir.
Q. Are you sure that you are correct about that, now?
A. Yes, sir, I am.
By Mr. Irwin: May I have his statement he made?
By Mr. Slater: Which one?
By Mr. Irwin: The 25th of July.
(Mr. Slater handing document to Mr. Irwin.)

By Mr. Irwin:

Q. Immediately after the happening of this accident, you made out a report on the 148 form, is that right?
A. Yes, sir.
Q. And at that time you stated that all you knew about the accident "is that when I looked up, he was hobbling away from the cut of cars." Is that true, or not true?
A. That is the same as I just said, that he was in the act of stumbling, and hobbling away from the cars.
Q. You saw him falling, didn't you?
A. Just when he was stumbling, yes, sir.
Q. You saw him stumble and fall?
A. I didn't see him fall.
142 Q. Well, you saw him stumbling, then?
A. In fact, he was in the position of stumbling, and partially fell down on one knee, and straightened up and hobbled over to the bench, all in one motion.
Q. You did not say in your statement that you saw him stumble, did you? (Handing document to the witness.)
A. Where is that?
Q. Right here. Let us read that aloud.
"All I know about this accident is that when I looked up, he was hobbling away from the cut of cars."
A. I say the same thing.
Q. That is true, is it?

A. Yes, sir.

Q. And you think that is the same as you testified to now, do you?

A. That means the same thing.

Q. It means the same to you. How many kinds of couplers are there?

A. There are several different makes.

Q. And some are more efficient than others?

A. Well, they all act about the same.

Q. I say, some are more efficient than others, are they not?

143 A. Yes, sir.

Q. What?

A. I believe so.

Q. And some are used a great deal more than others? That is right?

A. I do not understand that question.

Q. Some makes of couplers are in much more common use than other makes of couplers?

A. That is right.

Q. Some makes of couplers uncouple very easily? That is right?

A. Yes, sir.

Q. Others get so that they are difficult to uncouple?

A. Well, not unless there is something wrong with them.

Q. When they get worn, and when they get old and rusty, they are difficult to uncouple, aren't they?

By Mr. Slater: Just a minute. Counsel objected to my going into the photographs, and showing what other types of couplers are. I now object to him trying to show that there might be some other coupler in the world that would be defective. I want to object to this line of cross-examination.

By Mr. Irwin: I just want to ask one more question following that, that is all.

144 By the Court: I think he may go ahead.

By Mr. Irwin:

Q. What kind of a coupler was on this car that Penn was uncoupling?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. You don't know how it operates?

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A. No, sir, I didn't see it.
Q. You were the yard master, were you not?
A. Yes, sir.
Q. You were the top man in that yard?
A. That is right.
Q. Everybody in that yard took orders from you?
A. Everybody in the operation of making up trains.
Q. You were responsible for the operation of that yard?
A. Yes, sir.
Q. You are required to observe the book of rules?
A. That is right.
Q. And did you—
A. I always do.
Q. (Continuing) —inspect or examine the car on which Mr. Penn was injured?
A. I did not notice any car on which he was injured.
145 Q. You knew he was injured?
A. After examining his foot, I knew he was injured.
Q. You knew he was uncoupling a car?
A. He was attempting, or he was up there supposed to be uncoupling cars.
Q. Uncoupling a car, and he was injured at that time. You knew that, didn't you?
A. I knew he was injured, after I brought him down to my office, and saw the condition of his foot.
Q. And the car was still there at that time?
A. The car went down the lead. Where it went I didn't know.
Q. It was still there in the yard at that time, wasn't it?
A. Yes, sir.
Q. You could have identified that car, and found it very easily, could you not? Right?
A. Well, I didn't know which car it was. There were several.
Q. You could have found it, couldn't you? There was a switch list that had the name or number of every car, in the switch list?
A. I didn't know what car he was uncoupling.
Q. You saw him beside the car, did you not?
146 A. I saw him stumbling.
Q. You saw him stumbling?
A. Yes, sir.
Q. And you found out afterwards?

A. He wasn't near any car, outside of being alongside.

Q. You found afterwards that he was injured while uncoupling the car, did you not?

A. No, I did not.

Q. At no time? Didn't he tell you that?

A. He said he was attempting to pull the pin on a car when he stumbled.

Q. So you knew he was attempting to uncouple the car, didn't you, from what he told you?

A. Yes, from what he told me.

Q. The rules of the company require that:

"When persons are injured while coupling or uncoupling cars or in getting on or off the cars, whether passenger or freight, or in any other way in which the accident may have been caused by appliances or machinery, the cars, appliances or machinery must be immediately examined by the person in charge or by the agent to ascertain their condition and a report made of the inspection on Form
751 giving the numbers and initials of cars examined
147 and the names of the persons making the inspection."

You were required to do that by the rules, were you not?

A. Yes.

Q. Rule No. 806. And that was in force at the time?

A. Yes, sir.

Q. You did not do that, did you?

A. I didn't know he was injured uncoupling a car.

Q. I say, you did not do it?

A. There was no reason for me to do it.

Q. I didn't ask you that.

A. No, I did not.

Q. When an engine pushes freight cars ahead of it, the slack is in? Right?

A. Yes.

Q. When the brakes are put on, or when the engine pulls the cars, the slack is out?

A. That is right.

Q. Cars may be uncoupled while the slack is in, is that right?

A. That is right.

Q. And cannot be uncoupled when the slack is out?

A. That is right.

148 By Mr. Irwin: That is all.

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Redirect Examination by Mr. Slater.

Q. Did Mr. Penn say anything to you about the pin not working when he tried to uncouple the car?
A. No, he did not.
Q. If he had mentioned to you that he had any trouble with the pin, and it was defective, what would you have done at that time?
By Mr. Irwin: I object.
By Mr. Slater: He has asked him about his duties. I think it is proper.
By Mr. Irwin: I object to the question "if he had". The man knew the accident had occurred.
By the Court: Sustained.
By Mr. Slater: I believe that is all.
(Witness excused.)
By the Court: You may take a short recess, ladies and gentlemen.
(Whereupon a short recess was taken.)
By the Court: Proceed:

149 ARCHIE WESCOTT, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Slater.

Q. Please state your name.
A. Archie Wescott.
Q. Where do you live, Mr. Wescott?
A. Elmhurst, Illinois.
Q. Are you employed by the Chicago & North Western?
A. Yes, sir.
Q. In what capacity?
A. Conductor.
Q. How long have you worked for the North Western?
A. The 12th of last May, it was twenty-two years.
Q. Were you working for the Chicago & North Western on July 25, 1944?
A. I was.
Q. Do you know about an accident that occurred in Yard 8 at Proviso?
A. I do.

Q. Do you know the plaintiff here, Mr. Alfred S. Penn?
A. I do.
Q. And did you see him sustain an injury at that time?
150 A. I did.
Q. Where were you at the time you saw this accident?
A. The accident was at 35 switch, and I was at 39.
Q. Were you acting as conductor on that day?
A. I was the conductor, yes.
Q. Who was the headman, or the pin puller?
A. Penn was.
Q. Did you have another switchman working with you?
A. I did. I don't recollect his name, though.
Q. Where was he?
A. He was clear down the lead.
Q. Farther east?
A. At the lower end of the lead, farther east of us, yes.
Q. Do you remember the name of the engineer?
A. Fairchild.
Q. The engine was at the west end of the cut, wasn't it?
A. Yes.
Q. Headed west?
A. Yes.
Q. Do you remember about how many cars the engine had hold of when they started classifying that particular cut?
A. I don't know for sure, but I would say around twenty-five or thirty cars.
151 Q. Will you tell us how this classifying was done on these twenty-five or thirty cars you got, and what happened?
A. We were switching them out. It is a classification yard of about twenty tracks, classification tracks, and we had whittled the cut down to about—we must have had hold of ten or twelve cars. We were up the lead, and one was going clear down to the lower part of the lead, and I gave it a good kick, I should say six or eight miles an hour, and I gave a stop sign, and as soon as the slack went out, I immediately gave another kick, and, when he started for the pin, why he went like his leg went out from under him, sort of, and I believe he went down on one knee.
Q. This is Penn you are talking about now, is it?
A. Penn.

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Q. Just before this accident occurred, did you see one car had been cut off?

A. He cut off one car, yes.

Q. When he cut off that one car, was he riding alongside, riding on the stirrup on the side of the car, or was he on the ground?

A. He was running alongside of the car.

Q. When this car that was actually cut off went on
152 down to the east, do you know to what classification track that went?

A. Well, no, I don't know for sure, but it was between 45 and 50, somewhere in there, I believe.

Q. When that first car was cut off, did the train come to a complete stop?

A. No.

Q. About how fast would you say the train was moving?

A. Oh, three or four miles an hour.

Q. Did you give another sign of some sort?

A. I gave another kick sign, yes.

Q. And who did you give that sign to?

A. To the engineer.

Q. What is a kick sign like? Will you demonstrate that?

A. A sort of a highball, an overhand movement.

Q. Just before you gave the kick sign, what would the condition of the slack in the cars be?

A. Before I gave the kick sign?

Q. Yes.

A. It would be out.

Q. Had you just shortly before that time given the kick sign?

A. Before the slack was out?

153 Q. No.

A. We had just kicked one car.

Q. You let that car go. All right. Now, when you gave the kick sign, this second kick sign, after the one car had gone down to track 50, or whatever it was, was Penn still on the ground at that time?

A. Yes, he was.

Q. Where, with reference to the west end of the most easterly car was he?

A. He was right opposite it.

Q. Do you know whether he grabbed the pin lifter or not?

A. No, he started for it, and he never got to it.

Q. Did you see his foot go into the switch tie?
A. I just saw that his foot went like his leg went out from under him, I didn't see where he stepped for.
Q. Did the train then continue to move towards the east?
A. No, I stopped it right away.
Q. How did you stop it?
A. With a stop sign.
Q. Where did the train stop, where was the east end of the most easterly car when it came to a stop?
A. I should judge around 37 switch, somewhere in there.
154 Q. Then did you go over to where Penn was?
A. I went up there right away, yes.
Q. And did you walk with Penn to the yard office?
A. I did after a little bit. He sat out there—he limped pretty bad, he walked about maybe 10 feet, over to a bench, and he was sitting on that when I got up there, and I asked him what happened, he said he sprained his ankle.
Q. Will you keep your hand down?
A. And we walked down to the shanty, and I went ahead, and put the cut away, and he came out in a little bit, and he says, "Look at my foot," and there was a sort of a bump on his ankle, the top of his instep, you would call it.
Q. Where was the train at the time you were there with him?
A. It was standing on the lead.
Q. Did you then go back and resume your duties as a conductor?
A. I put that cut away, yes.
Q. What did you do with this car that Penn tried to pull the pin on?
A. I cut it off.
Q. How did you cut it off? How did you do that?
155 A. I gave a kick sign, and pulled on the pin, and gave the stop sign right away.
Q. Did you get on the side of the car to do that?
A. No, I did not.
Q. Did the pin and the coupler operate properly at that time?
A. Yes, it did.
Q. I show you photograph marked Defendant's Exhibit 6-A, and ask you to examine that. (Handing photograph to the witness.) Did you look at it?

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A. Yes, I did.

Q. Now, did you observe the car that was the most easterly one in the cut at the time?

A. Yes, I did.

Q. Do you know whether this is the same type of car, coupler and pin lifter, that were on that car that you handled?

A. I know it is the same type of pin lifter, but I am not sure about the car, because there was nothing wrong with the car, to my knowledge, and I saw no reason to check it. The car had nothing to do with him getting hurt.

Q. As far as the pin handle, lifter and coupler are concerned, does this correctly show the kind that was in-
156 volved at that time?

A. I believe it is, yes.

By Mr. Slater: I will offer this in evidence.

By Mr. Irwin: I want to cross-examine the man further before it is received.

By Mr. Slater: That is all. Cross-examine.

Cross-Examination by Mr. Irwin.

Q. How many kinds of couplers are there?

A. How many kinds? Oh, about three or four.

Q. And those three or four kinds of couplers are made under different patents, are they not?

A. I believe they are.

Q. They are different kinds of couplers, the couplers are not made the same? The different makes are different couplers, are they not?

A. Yes, they are different kinds.

Q. And they operate differently?

A. Yes, they operate differently.

Q. What kind of a coupler was on this car?

A. I believe it was the A.R.A. type. They are usually the ones that you pull on.

Q. Not what you believe. Do you know it was an A.R.A.?

157 A. I believe it was. I don't know for sure.

Q. What is that?

A. There are some that look about alike, yet operate the same. Now, the A.R.A., some you pull on, and some you push down.

Q. On this particular car, do you know it to be a fact this was an A.R.A., or are you just surmising that?

A. I surmise it was an A.R.A. I am not for sure, no.

Q. You were required, were you not, under the Book of Rules, under which you were operating, to make an inspection immediately of the car involved in this accident? Is that right?

A. There was no car involved in the accident.

Q. You knew that Mr. Penn was engaged in attempting to uncouple this car from the train, did you not?

A. He started to do it, but he never got hold of the pin at all.

Q. We will come to that. But you knew he was engaged in uncoupling this car?

A. That is what he was supposed to do, yes.

Q. These rules provide that:

"When persons are injured while coupling or uncoupling cars or in getting on or off the cars, whether passenger
158 or freight, or in any other way in which the accident may have been caused by appliances or machinery, the cars, appliances or machinery must be immediately examined by the person in charge."

That is right, is it not?

By Mr. Slater: Just a minute. I want to object to that, because this witness has testified the man was not engaged in pulling the pin at the time. That rule refers to being injured in operating the coupler, and he was not so engaged at the time he was hurt, according to this witness' statement. I object to the question.

By the Court: I will let him answer.

By Mr. Irwin:

Q. Did you make an inspection of this car?

A. I cut the car off.

Q. Did you make an inspection of it?

A. I am not a car inspector.

Q. I say, did you make an inspection of it?

A. No.

Q. Did anybody make an inspection of it?

A. Not to my knowledge.

Q. Did you make a report of an inspection on Form 751?

A. That is not my duty.

159 Q. You are familiar with the Book of Rules, are you, of the Chicago & North Western?

A. Yes, sir.

Q. And is that Rule 806 the rule in the rule book that was applicable at the time of this accident?

By Mr. Slater: Objection. I think that is a legal question. I do not think the witness should be required to answer that question.

By the Court: Sustained.

By Mr. Irwin:

Q. This book is the Book of Rules, isn't it?

A. That is the Book of Rules.

Q. That was in force at that time?

A. Yes, sir.

Q. You say that Mr. Penn had not even got hold of the pin lifter?

A. No, sir, he had not.

Q. He had not attempted to uncouple this car?

A. He started toward it when he made the misstep. He never reached it.

Q. He had not attempted to uncouple the car?

A. No, sir, he had not.

By Mr. Irwin: May I have the original of his statement, dated July 25, 1944?

160 (Mr. Slater handing document to Mr. Irwin.)

By Mr. Irwin:

Q. Is it not a fact that Mr. Penn was pulling the pins on this train, that was his work, he was pulling pins?

A. That was his work, yes.

Q. And he was running along with the cut, and was trying to pull the pin on a car, which he did? Isn't it a fact that at the time he was running along, trying to pull a pin on a car?

A. At the time he got hurt?

Q. Yes, sir.

A. No, sir.

Q. Did you make a signed statement or report of the happening of this accident on Form 148?

A. I don't know what form that is.

Q. You made a report of this accident?

A. I made a report of the accident.

Q. On July 25, 1944, the date of this accident, did you not?

A. I made a report, yes.

Q. How soon after the accident did you sign the statement?

A. Well, the accident happened around noon, and it was around 4:00 o'clock, I guess, or 4:30.

161 Q. And you made the statement to a clerk by the name of Kett?

A. Yes.

Q. Did you tell the clerk that Penn was running along with the cut, and was trying to pull the pin?

A. No, sir.

Q. And did you say to him that just as he pulled the pin, he made a misstep, like he was stepping in a hole?

A. That was the car he had just cut off. He was still running from cutting that car off.

Q. Did you say to him that just as he pulled the pin, he made a misstep?

A. That is the car he cut off, yes.

Q. Did you say that to Mr. Kett at that time?

A. I don't remember just what was in that statement. I don't remember.

Q. Did Mr. Kett, on the typewriter, write out what you said to him?

A. No. He took it in shorthand, and then he typewrote it out afterwards, and I signed it. I don't know about the numbers of them forms.

By Mr. Irwin: We will call this Plaintiff's Exhibit 1 for identification.

(Said document was marked Plaintiff's Exhibit 1, for identification.)

162 By Mr. Irwin:

Q. Looking at Plaintiff's Exhibit 1 for identification, is that your signature?

A. Yes, sir.

Q. And did you sign that?

A. Yes, sir.

Q. Was this written in when you signed it?

A. I don't recollect for sure whether it was or not. We often do that, I know. We didn't think much about the accident at the time.

Q. Nobody has asked you any question about that. After looking at that statement, do you now say that Mr. Penn did not have hold of the pin lifter at any time?

A. Yes, sir, I do.

By Mr. Irwin: That is all.

By Mr. Slater: I reoffer this photograph, your Honor.

By Mr. Irwin: I object to it, your Honor.

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By the Court: Objection sustained.

By Mr. Slater: You may step down.

(Witness excused.)

By Mr. Irwin: Dr. Zeitlin was to be here at five minutes after twelve, your Honor. It is just a minute after twelve now.

163 By Mr. Slater: I have a witness that will not take very long. It is a little out of sequence, but I think, to save time until Dr. Zeitlin arrives, we will put him on, until the doctor gets here.

By the Court: Very well.

MARTIN NAPOLI, called as a winess on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Slater.

Q. Please state your name.

A. My name is Martin Napoli.

Q. Do I pronounce that right? Napoli, is that right?

A. Yes.

Q. Where do you live?

A. 840 North Springfield, Chicago.

Q. What is your business or occupation?

A. I am a foreman for the Jefferson Electric Company.

Q. Where is the Jefferson Electric Company located?

A. Bellwood, Illinois.

Q. What line of business are they engaged in?

A. We manufacture transformers.

Q. Transformers?

164 A. Electrical transformers.

Q. How long have you been connected with that company?

A. Over twenty years, sir.

Q. What are your duties there, and what were they in the latter part of 1945, and the early part of 1946?

A. I am a foreman.

Q. What department are you foreman in?

A. Department 18.

Q. What does that department do?

A. We do miscellaneous assembly work on transformers. We also do what we call filling or sealing with compounds, and some packing.

Q. How many people do you have under your jurisdiction?

A. It varies from 80 to 90.

Q. Were you foreman in November and December, 1945, and January, 1946?

A. Yes, sir.

Q. And do you know the plaintiff in this case, Mr. Alfred S. Penn?

A. Yes, sir.

Q. Was he employed there at the Jefferson Electric Company?

A. Yes, sir.

Q. What department was he in?

165 A. Department 18.

Q. How long did he work there at the Jefferson Electric Company?

A. He started his employ in November, 1945, until January, 1946.

Q. What were his duties there, what did he do?

A. He was hired as a laborer.

Q. A laborer in that department, what does that mean? What labor work was it?

A. It consisted of supplying work to the packers. We have girls to do miscellaneous packing of transformers.

Q. Supplying work. Is that materials?

A. Materials used for packing.

Q. Does the labor get that in one part of the building, and take it to them, or what do they do?

A. It is on the side there, corrugated pieces cut to size, to fit in these cartons.

Q. In addition to supplying the material to people on the line, what else did he do?

A. He also helped another laborer we had there removing the packed cartons from a roller conveyor.

Q. What is the weight of one of these packed cartons?

A. It varies. We had different styles. Well, 80 pounds, 80 to 90 pounds.

166 Q. They would be removed from the roller to what?

A. They would be removed from the roller, and placed on a platform or skid, that we call.

Q. How many of these containers would be handled in the course of a day from the roller onto the skids?

A. We packed a skid with as many, I would say, as 20 cartons, or 25 cartons.

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Q. To each skid?
A. Yes.
Q. How many skids would you handle?
A. It varied according to the production of the day.
Q. How many would you say on an average? One or two, or more than that?
A. Oh, we used to have, I would say, around 20 skids a day.
Q. Did he do other work in addition to that that you have told me about?
A. Yes. He swept around the place.
Q. And did he walk with a limp while he was working there in that department?
A. No, I would not say that he did, no, sir.
Q. And did he do his work satisfactorily?
A. Very satisfactory.

Q. When did he quit there?
167 A. He quit in January, if I am not mistaken it was around January 13, 1946.
Q. Was he discharged?
A. Well, he was let out by the Union for failure to pay his Union dues.
By Mr. Slater: That is all. Cross-examine.

Cross-Examination by Mr. Irwin.

Q. He never was a member of the Union, was he?
A. Pardon?
Q. He never was a member of that Union, was he?
A. There is a trial period.
Q. I say, was he a member of the Union, or was he not a member of the Union?
A. No, he was not, sir.
By Mr. Irwin: That is all.

Redirect Examination by Mr. Slater.

Q. Was he eligible to join that Union?
A. Yes. He was asked by the Union chairman of the company.
By Mr. Irwin: I object, and move it be stricken out, what the Union chairman asked him.
168 By the Court: Let it stand.

By Mr. Slater:

Q. How long is the trial period there? Is this a closed shop?
A. Yes, sir.
Q. What is the trial period?
A. Three months.
Q. Would he be on his feet all day long there?
A. Yes, sir.
Q. How many hours a day did he work?
A. Eight hours a day.
Q. How many days a week?
A. Five, and there were some Saturdays.
Q. Did he complain to you about inability to work there?
A. Never.
By Mr. Slater: That is all.

Recross Examination by Mr. Irwin.

Q. He was a satisfactory man?
A. A very good worker.
Q. Got along with everybody?
A. Yes, sir, he did.
By Mr. Irwin: That is all.

169 *Redirect Examination by Mr. Slater.*

Q. Have you been subpoenaed to appear here this morning?
A. Yes, sir.
By Mr. Slater: All right. That is all.
(Witness excused.)

(And thereupon, during the presentation of the defendant's case, by leave of court, and by agreement of counsel, as heretofore more fully appears of record, at page 89, the plaintiff introduced the following testimony, to-wit:)

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170 DR. N. S. ZEITLIN, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Irwin.

Q. Your name is Dr. N. S. Zeitlin, is that right?
A. Yes, sir.
Q. Your office is where?
A. 55 East Washington.
Q. You are a physician and surgeon, licensed to practice in Illinois, are you, Doctor?
A. Yes, sir.
Q. What is your special line of work, what have you specialized in, if anything?
A. I specialize in the field of X-ray diagnosis and treatment.
Q. When were you admitted to practice?
A. In 1922.
Q. And where did you take your medical training?
A. At the University of Illinois, College of Medicine.
Q. Have you had any post-graduate study in the line of X-ray?
A. Yes, sir.
Q. What has that been?
171 A. For five years in the X-ray Department of the Cook County Hospital, Chicago.
Q. The largest in America?
A. Yes, sir. For six months at the Michael Reese Hospital, X-ray Department, in post-graduate X-ray work, and then post-graduate X-ray work at the University of Vienna, in 1926. For eight years in charge of the X-ray Department for the University Hospital here in Chicago, and similarly in charge, since 1929, at the Edgewater Hospital in Chicago.
Q. And you are at the present time, at the Edgewater Hospital?
A. Yes, sir.
Q. In charge of that department?
A. Yes, sir.
Q. Have you a laboratory of your own?
A. Yes, sir.
Q. Where is it?

A. At 55 East Washington.

Q. At my request, did you take some X-ray pictures of Mr. Alfred Penn, the gentleman sitting here with his hand up to his face?

A. Yes, sir.

Q. Do you know the date on which they were taken?

172 A. They were taken in April and in May.

Q. I have here some pictures that were taken. These pictures were taken in your office by Miss Sell, your technician, under your supervision and direction; is that correct?

A. Yes, sir.

Q. I have some pictures taken, here. If you will, step down and pick out those that are diagnostic, and show them to the jury, and tell them what they show. Plaintiff's Exhibit No. 1.

A. Film No. 1 is a front-back view of the ankle region, the left ankle region, showing the large tibia, that is the shin bone, and then the fibula here, and the joint space of the ankle region.

This black area here is the so-called joint space between the foot itself, which is this bone, and the tibia here.

On either side of the joint are two bone structures. On the outside of the foot is this wide bone structure called the head of the fibula, or what is known as the external or outer malleolus. That would be this bone that protrudes here. On the inside is the internal malleolus, this projection of bone structure here on the inside of the ankle joint.

173 Between these two bony prominences is the ankle joint itself. These bony prominences hold the foot between them, like tongs, between these two bony prominences, and the foot fits up into the ankle. This inner prominence, known as the internal malleolus, has been broken off entirely. The black space here between this bone and the rest of the shaft of the bone represents the fracture which has resulted in this large fragment being broken off. There is no bony union her. The bone being white in an X-ray film, the absence of the white shadow indicates no bone present, and this black space here between the rest of the shaft of the tibia and this large internal malleolus indicates that the fracture has not healed.

The region of the outer malleolus, or what is known as the outer mortise of this ankle joint, also shows a partial

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destruction of the cartilage and the bony portion adjacent to that cartilage of this portion of the joint, also traumatic in nature.

There is in the region of the head of the fibula, the external malleolus, there is some decalcification.

Q. What do you mean by decalcification?

A. A withdrawal of the calcium.

174 Q. Where does it go?

A. It is absorbed in the blood stream.

Q. What causes that, what may cause it?

A. Trauma is a factor.

Q. You mean injury?

A. Injury is a factor in having the white chemical of bone structure removed from the region of trauma.

Q. What effect on the bone does it have, to have the calcium removed?

A. If it is a permanent removal, it naturally weakens the bone structure.

Q. Before you get away from that, Doctor, this is the joint, as I understand it (indicating)?

A. The joint runs from here around over into the other side.

Q. What is there that holds the bones of this joint in their proper position?

A. The bones of the foot represented here by this white shadow, and particularly known as the astragalus. It is a bone structure that fits up into a mortise made by the external malleolus, that is that bony prominence here, and the internal malleolus on the inside of this foot, and these bony prominences act as a mortise, holding the foot in place so that it cannot slip either this way or that
175 way. And it is this internal mortise that has been broken off, and has not reunited.

Q. Does that have any effect upon the function or use of that ankle joint?

A. Yes, it would.

Q. In what way?

A. If the mortise is not intact, and not holding the astragalus tightly in place, there is too much play on that foot in this mortise, too much play, and the joint has the tendency to have too free a movement, too much play, and gives way.

Q. Are there any ligaments or muscles or tendons attached to this bone that has been broken off, or above that?

A. Yes, sir.

Q. Will you tell us what those muscles and ligaments are, or tendons, whatever you call them, and what their function is, what they do?

A. There are several sets of ligaments here all running around and binding this whole ankle joint region, so that weight-bearing can be properly made. Particularly in this region there is attached the deltoid ligament, which is a very strong ligament running around the front and back of the whole ankle joint region, literally binding it
176 in place.

Also, there is attached here the tibial calcaneal ligament, running from this portion here in the region of the fracture to the calcaneus, the heel-bone, and that helps to hold this portion of the foot together.

Q. What effect upon those ligaments and muscles does that fracture have?

A. It would have the effect, in that the insertion of these ligaments would not be as strong, and they would not be able to function as well.

Q. Having reference to the joint, the fibula, you spoke about some condition existing there in the cartilage. May that in any way affect the function of that joint?

A. Yes, sir.

Q. In what way?

A. The cartilage is a smooth, crystal-like substance between the two bony portions of a joint. Bones may not rub against each other without causing trouble, they must be separated in a joint by this crystal-like cartilage, which is a soft, smooth, elastic substance. As soon as this cartilage for any reason is roughened, or disappears, or is injured, it allows the bony surfaces to come closer together and cause trouble.

177 Q. I take it this photograph you have been looking at was taken on the 8th of April, 1945; is that right?

A. Yes, sir.

Q. Have you an opinion, based upon a reasonable medical certainty, as to the permanency of the condition which you have described as existing in this picture?

A. This is now a permanent condition.

Q. All right. Will you proceed?

A. Do you want to see the right side?

Q. You have taken a picture of the right ankle, have you?

A. Yes, sir.

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Q. And does it show up in a normal condition?

A. Yes, sir.

Q. Suppose you put it in the shadow box.

A. In this film here, No. 4, on this side, the mortise on the internal side is shown here to be intact, this tongue of bone tissue comes around and encases this astragalus bone, like that. On the left side, Film No. 1 shows this whole fragment broken off. Here it is intact.

No. 3 is a side view of the same left ankle region, and shows a large fragment of bone structure previously seen
in the front-back view; as we see it now in the lateral
178 view, it is not united, and shows its entire extent and
size. In this view, it is a fragment of about half an inch to almost three-quarters of an inch in thickness here, this whole fragment.

No. 2 is an oblique view of the same region, again showing this large fragment of bone structure broken off of the tibia, and in addition now shows here in the fibula this black area where there has been old periosteal tearing. The cover of the fibula, the periosteum, has been torn off, leaving this black shadow here.

Q. The periosteum is what?

A. It is the cover of ordinary bone structure. It is extremely thin. It tears the blood vessels and the nerves that ultimately feed the bone structure.

Q. How can it be torn, Doctor?

A. By injury.

Q. That is, these particular ligaments, muscles, or tendons attached to the periosteum?

A. Yes.

Q. I am just trying to get the mechanics, how it can be torn off.

A. The ligaments, in order to embed themselves into
bone structure, have to penetrate into the periosteum
179 or the covering of the bone, they literally fuse with
the periosteum. If they are violently torn off of their moorings, they will tear off part of the covering of the bone known as the periosteum.

Q. That picture having been taken on the 8th of April, 1945, have you an opinion, based upon a reasonable medical certainty, as to the permanency of that condition?

A. That is permanent.

There is a thickening here that could be accounted for, of the tibia, about 5 inches or 6 inches above the ankle,

which, in my opinion, represents an old injury, much older than in this region here.

Q. All right. Will you take the stand next?

When you took these pictures, did you have occasion to see or examine this man's foot, having in mind the weight-bearing line or the surface bearing part of the foot?

A. Yes, sir.

Q. What did you observe?

A. He had what is known as a condition of eversion of the foot.

Q. Does that mean turning in, or out?

A. The foot is turned outward, so that the patient
180 has a tendency to walk on the inside of his heel and the inside of his foot, thereby causing what is known as a battened foot, eversion of the foot.

Q. Have you an opinion as to whether or not that condition may be permanent, Doctor?

A. It is permanent, I believe, unless something could be done for it. I do not know what an orthopedic surgeon would do for it.

Q. You mean, in the way of surgery?

A. Yes, sir.

Q. May a condition of that kind be caused by injury or accident?

A. Yes, sir.

By Mr. Irwin: You may cross-examine.

Cross-Examination by Mr. Slater.

Q. When is the last time you saw this man?

A. I think it was some time in May of 1945.

Q. It has been considerably over a year since you have seen him, has it?

A. That is right.

Q. You have not taken any pictures since that time?

A. No, sir.

181 Q. Is it your opinion that the condition as shown in these pictures is the condition that is in his foot at the present time?

A. Yes, sir.

Q. You do not think there has been any change as to the location of the fragment, or position of the fragment, or anything like that?

A. I do not think so. I think the fragment is formed

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by fibrous tissue. Any change would be a change for the worse.

Q. You would not say there was a change for the worse, would you?

A. No, I have not examined him.

Q. Because you have not seen the man, or taken any pictures of him since that time?

A. That is right.

Q. Was there anything indicated in these pictures here that would make you believe that further pictures should be taken of the man?

A. No, sir.

Q. This examination you made of the man, that was a more or less superficial examination, wasn't it?

A. Just to take the proper X-ray films, yes, sir.

Q. What kind of an examination would you call
182 that? A local examination?

A. A local examination.

Q. You did not make any measurements of his foot, to see whether there was any swelling, did you?

A. No, sir.

Q. Was there any discoloration in his foot?

A. I would not remember, now.

Q. You see a great many cases, so, really, at this time, you do not have any specific recollection about the condition of this man's foot as you saw it from your physical examination at the time, do you?

A. Not as far as any discoloration is concerned, no.

Q. Did you testify at the last trial?

A. Yes, sir.

Q. Did you make any examination of the man's foot out in the hall? Do you remember doing that?

A. I may have. I do not remember right now. That has been some time ago.

Q. This fibrous union, will you tell us what that union is? What is a fibrous union? How is that accomplished?

A. When a fibrous union exists, it is an attempt by nature to try to keep a fragment of bone from going too far from its original position. Even though nature may
not heal over a fracture with new bone formation, if it
183 fails to do that, it may sometimes try and hold it together by fibrous tissue, which is, of course, a makeshift union, and not a true bony union. I believe in this instance there is at least some fibrous union present.

Q. The particle of bone is being held in place by something, isn't it?

A. Yes, it is held in place, I believe inadequately, but it is being held in place by the skin, the muscles over it, and some fibrous tissue.

Q. And you believe the position of the bone is the same now as it was fifteen months ago, when the picture was taken, do you not?

A. I believe essentially so.

Q. I think you described a pathology on the inside of the left ankle, that is the internal malleolus, did you not?

By Mr. Irwin: Just a minute. Will you assist this man, Mr. Bailiff? (Indicating a juror.)

(Whereupon Mr. Slater, the Bailiff and a juror left the courtroom.)

By Mr. Irwin: I noticed he was ghastly pale for about two or three minutes. I was afraid there was something the matter with him.

184 (Short interruption.)

(Mr. Slater returned to the courtroom.)

By Mr. Slater: The juror said he wanted to get some air. I think there is nothing seriously wrong with him. He is sitting next to a window.

I do have some more cross-examination. It is not very much, but I have not finished with the cross-examination.

(The Court left the bench, and went into the jury room.)

By Mr. Slater: While we are waiting, Doctor, will you put in those two pictures, one that shows the right leg, and the other that shows the left? Will you turn that one over, so they can examine it?

(Mr. Irwin and Mr. Slater went into the jury room.)

(Court and counsel returned to the courtroom, and the juror returned to the jury box.)

By the Court: Proceed.

By Mr. Slater:

Q. I believe you said, as I understood you, on your direct examination, that this condition of the left ankle

185 would cause extra motion, abnormal mobility?

A. It could be, because of a slight increase in mobility in the ankle joint, like unsteadiness.

Q. You would have more motion in his ankle joint than a person ordinarily would, is that right?

A. You would have more lateral unsteadiness. Not motion of the joint itself, but more lateral deviation.

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Q. Did you find that was the case when you examined him?

A. No, I did not examine him for that.

Q. When you did make your examination, what did you find in the way of limitation of motion of the foot?

A. There was diminution of the normal movements of the foot, that is, the jackknife or hinge movements of the foot, those were diminished.

Q. To what extent could he move his ankle up and down?

A. I do not know. I did not make too great an examination of that. They were not within the normal range of the movements of the ankle.

Q. Would you say they were very slightly off the normal range?

A. I would say to a very major degree.

Q. Was there anything in the condition of this ankle now that would prevent him from using it in a normal
186 function, in a normal way?

A. It could. I do not know that it would, but it certainly could, because of the permanency of the pathology.

Q. How would that limit the use of his foot and his ankle?

A. Unsteadiness. If that mortise is not intact—and it is not intact, it is broken and not united, the ankle may give way.

Q. It would give way only in the event that this particle came loose from the fibrous union, wouldn't it?

A. No. The fibrous union cannot be as steady, as rigid a mortise as if there were bony union.

Q. Which way would the weakness be, in and out, or up and down, or what?

A. In and out, lateral. That is why he has the eversion of the foot.

Q. Is there some sort of a shoe he could wear, that would be of help, some kind of a heel?

A. I imagine a high shoe would be of help.

Q. And what about a Thomas heel? Would that be of help?

A. That I would not know.

Q. Do you remember testifying in regard to that
187 when you were here on the stand before?

A. A Thomas heel?

Q. Yes.

A. I do not suppose I have ever used that term.

Q. Would the ankle be better off if he used a brace of some kind?

A. What was the question?

Q. Would it help his ankle to wear a support of some kind?

A. I think it would.

Q. Now, on the other side, on the outside of the ankle, the tip of the fibula, you saw some difference in the condition of the fibula in the left as compared with the right, did you?

A. The fibula had a periosteal tearing in it.

Q. But that is very slightly, is it not?

A. Well, that was about a quarter to one-half inch around.

Q. Was there any real significance to the condition there on the outside of the ankle?

A. Merely that it indicates that there was an injury there.

Q. There has been a healing of that injury, has there not, on the outside of the ankle?

188 A. I think all injuries will heal. I think that has healed as well as it could.

Q. Do you know whether that might have come from a separate and distinct accident from the injury to the inside of the ankle?

A. It is theoretically possible. I would not be able to differentiate that particular injury, as to the exact age.

Q. Did the man tell you that about six or seven months following this first injury, that he had received an injury to the outside of his ankle, the same ankle?

A. He may have. I do not remember right now.

Q. Would the fact that he, in another accident, injured this ankle on the outside, on February 3, 1945, be sufficient to account for the pathology that you have described in the fibula?

A. February 3, 1945?

Q. As compared to the original accident on July 25, 1944?

A. It is possible that the lesion of the periosteal tearing on the external side could date to February of 1945, my films having been taken in March and April of 1945, or April and May.

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Q. This decalcification you mentioned, that is an
189 absorption of the calcium into the blood stream, is it not?

A. Yes, sir.

Q. And that need not be a permanent condition, decalcification?

A. It need not be.

Q. That would be restored by use and activity of the member injured?

A. It usually is restored that way.

Q. Would the condition you have described now be sufficient to cause this man to walk with a limp at all times?

By Mr. Irwin: Of course, your Honor, the Doctor was called only as an expert in medical and X-rays, and the field he is in now is that of orthopedic surgery.

By Mr. Slater:

Q. Doctor, you are a graduate of a recognized medical school, and you have been on medical faculties, haven't you?

A. Yes.

By Mr. Slater: I submit the man is qualified to answer the question.

By Mr. Irwin: I will have an orthopedic surgeon
190 for you at 2:00 o'clock.

By the Court: What is the question?

(Question read by the reporter.)

By the Court: He may answer.

By the Witness:

A. Judging from the X-ray films,—

By Mr. Slater:

Q. And your own examination?

A. (Continuing.) —and my limited local examination,—

Q. Whatever it was.

A. (Continuing.) —I would say that he would limp most of the time, and, at times, he probably would not limp at all.

Q. In other words, he could walk without limping in his present condition, could he?

A. No, I do not say that. I would say that he would be limping most of the time if he bore any heavy weight on his foot, and at times it is likely that he would not limp

at all. That is speculation in part, certainly, because it is based upon a medical conception, and the X-ray films are the only things I have here.

Q. Would you say that bearing and carrying a heavy weight would cause him to limp?

A. I think, if he bore it any length of time, he
191 would begin to limp.

By Mr. Slater: That is all.

(Witness excused.)

By the Court: We will recess until 2:00 o'clock, ladies and gentlemen.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day, Wednesday, October 9, 1946.)

192 Wednesday, October 9, 1946,
2:00 o'clock p.m.

Court convened pursuant to recess.

Present:

Mr. Irwin,
Mr. Slater.

DR. LEON ARIES, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Irwin.

Q. Will you state your name?
A. Leon Aries.
Q. You are a physician and surgeon?
A. Yes, sir.
193 Q. Licensed to practice in Illinois?
A. Yes, sir.
Q. Where is your office?
A. 30 North Michigan Avenue, Chicago.
Q. And you have been practicing medicine how long?
A. 1932.
Q. From what schools or colleges did you graduate?
A. I am a graduate of the University of Illinois, College of Medicine, and Northwestern University Research

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Department, where I took my Doctor of Philosophy Degree in Surgery.

Q. Your office is where?

A. 30 North Michigan Avenue.

Q. Have you specialized in any particular branch of medicine or surgery?

A. Yes, I have specialized in fracture work, fractures.

Q. In fractures?

A. Yes, sir.

Q. Are you connected with any hospitals or schools of learning, or institutions, that have given you special experience in matters of your chosen profession?

A. Yes, sir.

Q. What is your experience, Doctor?

A. After graduating from the University of Illi-
194 nois, I took an internship at the Cook County Hospital, in Chicago, for a year and a half, I was then a resident in surgery in the Fracture Department of the Cook County Hospital for two and a half years. I was then on the Staff of the Cook County Hospital, where I have been on the Staff until the present time.

I have also taken a Master's Degree in Pathology, at the University of Illinois, after which I spent several years at Northwestern University, and took a Doctor of Philosophy Degree in Surgery, and did special research work on bone growth and fracture treatment.

Q. Are you connected with any hospitals now?

A. Yes, I am on the Staff of the Cook County Hospital, the University Hospital, the Mt. Sinai Hospital, and the Michael Reese Hospital.

Q. The plaintiff in this case, the gentleman sitting back there, Mr. Penn, you have examined him, have you?

A. Yes, sir.

Q. On at least two occasions?

A. Yes, sir.

Q. The first time was last year, or a year or so ago when this case was tried before; is that right?

A. Yes, sir.

Q. Then have you examined him recently?

195 A. I examined him yesterday.

Q. At your office?

A. Yes, sir.

Q. In connection with your examination of him, have you also looked at X-ray pictures?

A. Yes, sir.

By Mr. Irwin: I think, before we go further, I will let you tell what you see in the pictures. Then you can tell us about your clinical examination afterwards.

By Mr. Irwin:

Q. That is Plaintiff's Exhibit 1, is it?

A. Plaintiff's Exhibit 1, yes, sir.

Plaintiff's Exhibit 1 is an anterior-posterior X-ray film, that is, an X-ray taken with the film placed in back of the foot, and the X-ray penetrating from the front, and falling on the plate in the back of the foot.

We see the lower end of the large bone of the leg, known as the tibia; the smaller or thin bone, which is on the outside of the foot, known as the fibula; and in between these two bones we have the astragalus, which articulates or meshes with the bones of the ankle.

In this X-ray, we see that there is an abnormal dark shadow running through the tibia, on its medial sur-
196 face, and this fragment is known as the medial malleolus. That has been detached from the fibula by fracture.

In this film, we see the edges are smooth, and the bones are completely separate, and only held in by a dense fibrous tissue, and this space we see between the medial malleolus and the astragalus is wider than it normally should.

On the opposite side we find that the astragalus touches the fibula or external malleolus in two places, namely, the inferior margin and the superior margin, while these surfaces should be separated by a shadow, due to the cartilage that lies in the joint.

We have here a fractured medial malleolus of the tibia, with a non-union, that is, there is no bony growth between the two fragments, and we have a widened joint space, while on the lateral surface we have a diminished joint space, which indicates that the cartilage which keeps the surfaces of the bones apart has been destroyed, and we now have the bones touching one another.

Q. Anything further in that picture?

A. No, sir.

Q. Will you look at the others?

197 A. Plaintiff's Exhibit 2 is an oblique view of the ankle, in which we find the tibia, the fibula, the astragalus, and the heelbone, known as the os calcis, also shows,

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as well as the small bones of the foot, namely, the metatarsal and the scaphoid.

In this view, again, we see the irregularity of the medial malleolus as it is attached to the tibia, and the joint space is extremely irregular, instead of a smooth margin, we see an irregular margin.

In the fibula, we see a dark oval shadow, which is less dense than the surrounding bone, and is indicative of an absence of actual bony trabeculae, that bone is not solid. This is a cyst, due to the lack of blood supply, usually following trauma. Again we see the joint area of the medial surface of the fibula.

Q. Tell us more about a cyst, what you mean by a cyst.

A. A cyst is an enclosed cavity, which may contain fluid, or may have just a sac filled with fibrous tissue.

Q. Would that be anything like the tearing of the periosteum?

A. The tearing of the periosteum may result in a cyst, in that the blood supply to the bone is derived from the periosteum, and if you tear off the blood supply, that
198 part of the bone undergoes cystic change.

Q. Do you see anything else there?

A. No, sir.

The others I do not think reveal any further pathology, except in Plaintiff's Exhibit 3 there is an irregular spur on the medial surface of the tibia, shown as this sharp little spicule of bone.

Q. Where does that come from?

A. That is usually a tear of the surface of the bone which leaves a ragged edge. This one shows nothing further.

Q. Did you yesterday make an examination of this man's foot?

A. Yes, sir.

Q. What we call a clinical examination, is that it?

A. Yes.

Q. Tell the jury what you found when you examined the man's foot.

A. Upon examination I found that the patient was approximately forty-nine years of age, and his essential findings were in his ankle of his left foot. That ankle was wider than the right ankle. The actual diameter was
199 3⅜ inches, while that of his right foot was exactly 3 inches, so the ankle was ⅜ths inch wider. On circum-

ference, the right ankle measured 10⅛ inches in circumference, and the left ankle was 10⅜ inches in circumference, so that the left ankle was approximately ¼ inch larger.

The motion of the ankle in the left foot was limited in dorsal flexion, that is, on raising the ankle upward, there was limitation to approximately 40 per cent of the normal, and on extension, or planar flexion, there was about a normal range of motion.

The foot, when allowed to rest, was found to be in eversion, that is, the foot is facing outward, so that the walking surface is on the inner surface of the foot rather than on the outer. That is, the eversion is associated with a displacement of the ankle outward, and that is accounted for by the findings demonstrated on the X-rays.

The inversion, that is, turning the foot inward, is limited to approximately 40 per cent of the normal, so that he cannot turn his foot completely in nor completely out nor completely up.

Q. May the conditions which you have described result from injury?

A. Yes, sir.

Q. Have you an opinion, based upon a reasonable
200 medical certainty, as to the permanency of those conditions which you have described as having found?

A. Yes, I have an opinion.

Q. What is your opinion?

A. I think that these findings are permanent.

Q. Did you find anything which, in your opinion, might be the cause of pain, any of these conditions which you have described?

A. Yes.

Q. What conditions did you find that are the cause of pain?

A. First, the alignment of the weight-bearing axis of the ankle joint. Normally, the weight-bearing should fall directly through the center of the astragalus, and then be transmitted to the large toe, or the great toe, so that the weight falls evenly through the middle of the foot. In this patient, the eversion of the foot allows the weight to fall on the inner surface, thereby putting all the ligaments under tension whenever weight is put on the foot, and that stress of pulling on the ligaments during the whole day will cause pain.

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Q. Did you observe whether or not he is wearing any special brace, or anything of that sort, in his shoe?

201 A. He was wearing a corrective shoe, a wedge was placed on the inner surface of his shoe, so that the foot would be brought back into its normal position.

By Mr. Irwin: I think you may cross-examine.

Cross-Examination by Mr. Slater.

Q. You have not treated this man, have you, Doctor?

A. No, sir.

Q. And you examined him only for the purpose of coming over here in court and testifying, did you not?

A. Yes, sir.

Q. When did you examine him the first time?

A. In April of 1945.

Q. And did you make any measurements of his foot at that time?

A. Yes, sir.

Q. And did you testify in court on the first trial?

A. Yes, sir.

Q. Did you tell us the difference in measurements of his foot when you testified at the first trial?

A. I think I did. I do not remember.

Q. You are uncertain about it?

A. I am uncertain about whether I testified as to

202 the measurements.

Q. In your opinion, has his foot reached a permanent condition?

A. I cannot understand that question.

Q. Is it permanent pathology?

A. Yes.

Q. There has been no change in it, in your opinion, since the last X-ray pictures that were taken, is that correct?

A. Clinically, or by X-ray?

Q. In any way.

A. I have no recent X-rays, so I cannot testify as to the X-rays; but clinically his foot looks exactly as it did a year and some months ago.

Q. Would you expect that X-ray pictures taken at this time would show the same condition as pictures taken in April and May of 1945?

A. I think so.

Q. So that there has been no change in the position of this little piece of bone that is broken off, the end of the malleolus?

A. That is true.

Q. That piece of bone has been held in the same position by this fibrous union for the past fifteen months
203 or so; is that right?

A. Yes.

Q. I think you mentioned some condition that was on the outside, or on the fibula side of the ankle; did you not?

A. Yes, sir.

Q. Do you know whether that condition on the fibula side was caused by this accident on the 25th of July, 1944?

A. Since I have no X-rays to compare it with, I cannot be sure whether that existed before or not.

Q. The pathology or abnormal condition on the outside of the ankle may have come from a subsequent injury, is that correct?

A. It may have come from a previous, but not a subsequent, because it is present in this film.

Q. I mean, the condition of the fibula may have been something that was brought about by an injury subsequent to the original injury on the 25th of July, 1944?

A. That is problematical.

Q. Yes. You do not pretend to tell us now that the condition that you find on the outside of the left ankle has anything whatsoever to do with the injury this man sustained on the 25th of July, 1944, do you?

204 A. No, I would not try to correlate the two unless I had a picture before, showing that was not present before that date.

Q. Have you told us all the pathology? And what does that mean, "pathology"?

A. Pathology is an abnormal physiology, an abnormal condition from the normal.

Q. Have you told us all the pathology these X-ray pictures show?

A. There is an arthritic change within the joint. We mentioned the joint space was diminished on the lateral surface.

Q. You told us about that.

A. That is an arthritis. I did not name it as such, but that is an arthritis of the joint.

Q. Have you told us now everything of a pathological nature shown by these X-ray pictures?

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A. Yes, sir.

Q. Have you noticed that there is any evidence in the upper part of these pictures that you have examined, showing an old injury?

A. There is just a little question in one film of a deviation from the normal in the tibia.

Q. In the what?

205 A. In the tibia.

Q. About how far above the ankle is that?

A. A third of the way, a third of the distance of the leg.

Q. And that is some pathology you have not told us about at the present time?

A. Since it is not on the picture completely, I would not testify as to something I cannot see completely.

Q. X-ray is not your specialty, is it?

A. Not as a specialty, but I use X-ray every day, in all my work.

Q. But don't you have someone else take the X-ray pictures?

A. A technician, yes, sir.

Q. And aren't those pictures read by someone else other than yourself, in most instances?

A. I read them myself. There usually is a technician that takes them, a Roentgenologist that reads them, and then I see the pictures myself.

Q. I believe you told us about some limitation of motion that Mr. Penn had in turning his ankle out, in, and up?

A. Yes, sir.

Q. You limited your testimony to purely objective

206 symptoms when you testified on direct examination?

A. Yes.

Q. Will you tell me what the difference between objective and subjective symptoms is?

A. A subjective symptom is one that the patient feels, that you cannot determine without him telling you what he feels.

A objective symptom is something I can determine with my senses, either seeing or feeling or measuring or hearing.

Q. Coming to the conclusion that there was this 40 per cent limitation—first of all, a patient could limit motion in his ankle or any other part of his body if he wanted to do it, couldn't he?

A. No, not completely.

Q. He could interfere with it, if he was so minded, and it would be difficult for you to decide how much limitation if any there was?

A. It would be very difficult in the ankle, because I could overcome his resistance.

Q. Did you overcome his resistance in this one, in determining that there was a 40 per cent limitation?

A. Yes, I did.

Q. Then this 40 per cent limitation is something
207 that is caused by the internal condition of the left ankle, isn't it?

A. Yes.

Q. And it is something that he does not have any control over at all?

A. Correct.

Q. Is that condition something that would cause him to walk with the limp he walks with?

A. Partially, yes.

Q. What else would cause him to walk with a limp except the condition of his foot?

A. The abnormal position of his foot.

Q. That is something that is out of his control, too? He is not intentionally turning his foot in, is he?

A. No.

Q. So that is something that is out of his control, as well?

A. That is right.

Q. So that when he walks with a limp, it is because of the internal condition of his ankle?

A. Correct.

Q. Is that internal condition a permanent one?

A. Yes, sir.

Q. So that he would have to walk at all times with
208 a limp, wouldn't he?

A. Yes.

Q. Would you say that a patient, walking in this condition, could not walk without a limp?

A. If he wears a corrective shoe, that holds his foot in correct position, he could walk without a limp with his shoe. Barefoot he could not.

Q. As he walks now, would you say he could walk without a limp, or would you say the limp he has now is something simulated, or put on?

A. If he walks without a shoe—

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Q. I am talking about him walking with his shoe on, you say he can walk normally?

A. I didn't say anything like that.

Q. I am asking you now. Do you say that he can walk perfectly normal, and get along without any limp at all now, with this condition?

A. I think he cannot. I think he will have a limp.

Q. And that is because of some mechanical condition inside of his ankle?

A. Yes, sir.

Q. So that this limp he has is not something he can put on one minute, and take off another?

A. No, that is correct. That is permanent.

209 Q. Is the condition of his foot such that it would interfere with his doing heavy work?

A. It depends on the length of time. I think he could do heavy work for short periods of time.

Q. How long do you mean by short periods of time?

A. It depends on how much distress he has. If he has no pain, he could do it. If he has pain, it is probably limited.

Q. Do you think he could be on his feet day after day, working in a factory of some kind, and lifting boxes and batteries and heavy objects around, and moving crates, and handcarts, and things like that?

A. If he wears a corrective shoe, I think he could carry on a good part of that work.

Q. Incidentally, have you had any other cases like this?

A. Many.

Q. Where there has been a fracture of the internal malleolus?

A. Yes, sir.

Q. Have you handled those cases yourself, and operated on them?

A. Yes, sir.

Q. Have any of the patients that you have handled

210 resumed their normal duties involving heavy work?

By Mr. Irwin: I object to that, your Honor.

By the Court: Sustained.

By Mr. Slater:

Q. Did you examine Mr. Penn's right foot when you made this examination yesterday?

A. Yes, sir.

Q. And did you find that he was somewhat flat-footed in his right foot, as well?

A. Yes, sir.

Q. There is no injury that you could find in his right foot yesterday?

A. No.

Q. You saw no evidence of a prior injury there?

A. No, sir.

Q. What do you say the size of this bone is that was fractured at the end of the malleolus?

A. The medial malleolus, approximately three-quarters of an inch square.

Q. The malleolus acts with the fibula as sort of a mortise to hold the ankle in place, doesn't it?

A. Yes, sir.

Q. This fractured malleolus is not giving way and permitting the ankle to give way, is it?

211 A. It has given way, and allowed the ankle to be deviated laterally.

Q. To what extent has it permitted the ankle to be deviated?

A. To the extent of three-eighths of an inch.

Q. The three-eighths of an inch is the difference—

A. In diameter, and that diameter is made up by the shaft of the mortise to the outside.

Q. Was there any discoloration in the ankle when you examined it?

A. Yesterday?

Q. Yes, sir.

A. No, sir.

Q. This man was wearing some sort of a built-up heel, was he?

A. He had a wedge in the heel.

Q. Is that what is known as a Thomas heel?

A. A Thomas heel is one that has a projection, without necessarily an elevation. A Thomas heel is one in which the inner surface is approximately three-quarters of an inch longer than the outer surface. This is a revision of the inner surface with a wedge.

Q. You found that was a proper support that he was wearing, did you?

212 A. That is correct.

Q. And that support was assisting in the condition of his foot?

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A. Yes, sir.

Q. But as far as being able to get along and function with the foot normal at any time, you would say that he could not do that, is that right, walk normally, use his left foot normally, would you say that because of the mechanical condition, he cannot do it?

A. Yes, sir.

By Mr. Slater: That is all.

By Mr. Irwin: That is all.

(Witness excused.)

By Mr. Irwin: Plaintiff rests.

Whereupon the plaintiff rested his case.

By Mr. Slater: I understand counsel for the plaintiff rests. To save time, I will withhold presenting my motion, if it is agreeable, and go ahead with the defendant's witnesses.

By the Court: Very well, if that is agreeable to the plaintiff, and it is to the Court.

213 (Whereupon the defendant resumed the presentation of its case, as follows, to-wit:)

DR. LESTER H. HILLS, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Slater.

Q. Will you state your name, please?

A. Lester H. Hills.

Q. Where do you live, Doctor?

A. Elmhurst, Illinois.

Q. You are a physician and surgeon, are you?

A. Yes, sir.

Q. Of what medical school are you a graduate?

A. Northwestern.

Q. When did you graduate from Northwestern?

A. 1909.

Q. Where did you take your internship?

A. Grant Hospital.

Q. At the Grant Hospital?

A. In Chicago.

Q. Have you been practicing continuously since
214 that time?

A. Yes, sir.

Q. Are you on the Staff of any hospital?
A. At the Elmhurst Memorial Hospital.
Q. Is that at Elmhurst, Illinois?
A. Yes, sir.
Q. Do you specialize in any type of work?
A. Not specifically. I do more industrial work than anything, but I am in general practice.
Q. Do you do surgery?
A. Yes, sir.
Q. And you are a member of the various medical societies, are you?
A. Yes, sir.
Q. Do you know the plaintiff in this case, Alfred S. Penn?
A. Yes, sir.
Q. Did you attend him?
A. Yes, sir.
Q. I believe you testified at the previous trial of this case, did you not?
A. Yes, sir.
Q. Have you refreshed your recollection about Mr. Penn's case, that you examined him, and what you did
215 for him, and what his condition was when you last saw him?
A. Yes, I looked over my records.
Q. Will you now tell the Court and the jury when you saw him, how often you saw him, and what you did, and what the condition was when you last saw him?
A. May I look at my records?
Q. If it refreshes your recollection.
A. I first saw him on the 25th of July, 1944. He was brought to the hospital with an injury to his left ankle. An X-ray picture was taken, which disclosed a fracture of the inner malleolus of the ankle, that is the tip of the tibia on the left leg at the inner border of the ankle.
He came back in a day or so, so I could see whether the cast was—
Q. Did you put a cast on him at that time?
A. Yes, I reduced the fracture, after X-ray, and put a cast on him, and had him come back and let me see that the cast was all right, not too tight, not too much swelling.
Then I saw him again on the 17th of August.
Q. 1945?
A. 1945.

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Q. Or 1944? Would that be 1944?
216 A. 1944, yes.
Q. All right.
A. Then I saw him again on the 22nd of August, which was not quite four weeks after I put the first cast on him. I took the cast off and X-rayed him, and put the cast back on again.

Then I saw him again on the 19th of September, and removed the cast, and left it off after that so that he could begin to move his ankle and restore the function.

Q. Did you see him after that?
A. Then I saw him again on the 3rd of October; I saw him again on the 31st of October; I saw him again on the 14th of November; and the last time I saw him was on the 28th of November.

Q. Will you tell us what condition you found he was when you last saw him on the 28th of November, 1944?
A. At that time the ankle showed the bone had not healed by a bony union, but had healed by a fibrous union, its tip was in good position, as near as we could see. The function of the ankle was good. His weight-bearing alignment was good, and I could see no reason why he should not get a perfect functioning result.

Q. Was there anything in the man's condition that
217 would prevent him from carrying on ordinary work which involved being on his feet, and climbing, and using his ankle as a person ordinarily would?
A. No, I saw no reason why he should not have done that kind of work.

Q. This fibrous union, can you tell us what that is in respect to strength, and holding a bone in position?
A. Well, it holds it. It is not as firm as a bony union; but as far as function of the ankle is concerned, it does not interfere with the function of the ankle, because the ankle functions forward and backward very little in a normal ankle, that is, there is a lateral movement of the ankle.

Q. Is the malleolus broken off at a point above the ankle joint?
A. No, below the level of the articulation.

Q. Is there any part of the malleolus that would serve and function in holding the articulation so that it would keep the ankle from going back and forth?
A. No. It does not.

Q. The ankle does not go back and forth abnormally?

A. That tip does not enter into the function of the ankle, backwards and outwards.

Q. Is there still a mortise on each side, so that it
218 keeps the ankle in proper position?

A. That is right.

By Mr. Slater: I believe that is all. Cross-examine.

Cross-Examination by Mr. Irwin.

Q. You say, Doctor, that this fracture of the malleolus was below the surface of the joint, is that right?

A. Below the articular surface. There is a projection below the line of the articular surface.

Q. How much projection is there below the line of the joint?

A. Not very much.

Q. How much?

A. I cannot tell you exactly, offhand, without measuring it.

Q. How much would it have to be to keep it from slipping?

A. Very little.

Q. How much?

A. I cannot answer that exactly in inches, or half inches.

Q. Step down here, will you, please? Is that the
219 way you expected to see it?

A. That is about the same, although that is not, I would say, a true anterior-posterior view. You are coming down on it this way, where it should be across this way (indicating).

Q. This is the surface of the astralagus, is that right?

A. That is right.

Q. And that is below the lowest tip of the fracture point, isn't it?

A. As it looks in this particular view, but, as I say, that is not a true anterior-posterior view.

Q. You mean you cannot see anything there, as a doctor, that we, as laymen, cannot see? You do not mean that?

A. I mean if that were a true picture, it would look different than it does in this.

Q. Is there anything about that picture that is not true?

A. It is not true in regard to the appearance of the length of this in here, because you are shooting down this way, instead of coming across in a true anterior-posterior view, and you are dealing in shadows in X-rays.

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Q. That joint is centered very close to the center
220 of the film, isn't it?

A. Yes, but your tube is above the ankle, and shooting down, instead of being straight across. That is the difference.

Q. By the way, you took an X-ray picture?

A. That is right.

By Mr. Irwin: Yes. Here they are.

By Mr. Slater: Where is it? Let us see it. There are about five of them here. They are chronologically arranged.

By Mr. Irwin:

Q. Looking at your picture, that was a picture taken several months later—will you step over to the side, so the jury can look at this, too—show us on your picture where the part of the malleolus is down on the side sufficient to prevent the slipping of this joint.

A. That is the first picture that was taken after the injury, and that, too, shows that that is not a true anterior-posterior view.

Q. All right. Let us get one that is, then. Does that show any different position?

A. All of those are about the same.

Q. It shows the same as our picture?

A. They are not a true "a. p."

221 Q. Any reason you did not take a true film?

A. No. That is the technique.

Q. Does that one show anything different?

A. They are about the same. There is a lot of difference. There is a little more of the foot.

Q. Where is that?

A. Right there, there is a little more of a projection that would impinge there. It is not very much.

Q. How about that one?

A. That is the same. This was taken 9-19. You have here a fibrous band that is connecting the point of this with this, which would also prevent this from letting the ankle come out. Let me explain this.

Q. I have not asked you about that.

By Mr. Slater: Just a minute, Mr. Irwin. You asked him a question, you should let him finish the answer.

If your Honor please, I submit that Mr. Irwin asks him a question, and breaks him off in the middle of his answer. I think the witness is entitled to finish his answer.

By the Court: Read the answer.
(Record read by the reporter.)
By the Court: Let him answer.

222 By Mr. Irwin:

Q. Have you finished your answer?
A. No, not exactly.
This shows the beginning of a fibrous band here which united these two fragments here, and this fragment is impinging or resting against the lower end of this bone, which makes the same obstruction to any side-slip on this joint as it would if this thing had grown fast. It is not quite as solid, but it answers the same purpose.
Q. Looking at this one, does that show any different condition from any of the others?
A. When the weight is put on this ankle, this thing would be narrowed here, and there is a little projection here which would help to interfere with any sliding of the joint.
Q. How large would you say that projection is?
A. I would say a quarter of an inch.
Q. A quarter of an inch?
A. About that.
Q. It is nearer one-eighth of an inch, isn't it? How many parts is the fragment broken into?
A. Apparently the separation is in the middle here, two pieces.
223 Q. You say the fragment is in two pieces?
A. It appears to be, yes.
Q. Does that show any difference?
A. Yes, that is a little bit more prominent than the other. That is, it shows this projection down here a little more sharply than the other.
Q. Would you say it shows it any more than in the picture that was taken by Dr. Zeitlin?
A. I think that that other one is sharper than this one, in all probability.
Q. That is because it is a later picture, isn't it?
A. Possibly, or not as good a picture.
Q. That is a better picture than this?
A. No, I don't think so.
Q. Let us look at this one. What does that one show?
A. That was the last film we took, and that also shows this obstruction to the lateral slip of the bone. The pro-

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jection here is not as clearly outlined as it was in the other film.

Q. That is because it is an oblique film?

A. It is in the healing process.

Q. Doesn't it show a different position because it is an oblique picture?

A. Yes, it is an oblique picture, that is true. That 224 is about the same there, you still have that projection.

Q. Did you at any time ever take a picture?

A. No, I did not take any other picture than is there.

Q. Did you ever have a picture that showed the true obstruction?

A. It does not come down, no. This piece is broken off, it does not come down to the normal length.

Q. You never had a picture taken of that kind, is that right?

A. No, never, but what is there is all I have had taken.

Q. You mean by a fibrous union a callus union, don't you?

A. No. It is a little different than a callus union.

Q. How does fiber differ from callus?

A. Callus is made up of a different sort of tissue.

Q. I do not mean bone callus, you understand?

A. What?

Q. I do not mean a bone callus, a callus that forms into bone. I mean a callus formation, like crystal.

A. It has more the consistency of crystal than it has of bone.

Q. A crystal is not fixed like bone? It may bend 225 and give a little?

A. No, it is not as solid as bone, although with a fibrous union it can be just as tight as a bony union, so far as formation is concerned.

Q. It will give, though?

A. To a certain extent.

Q. I think you put a cast on him the first day?

A. That is right.

Q. Was the leg pretty badly swollen at the time?

A. There was some swelling there, yes.

Q. Wouldn't it have been better to have waited until the swelling subsided before putting the cast on?

A. We never do that.

Q. Then when the swelling subsided, the cast became loose? Right?

A. Not very much, no, I wouldn't say it did.
Q. It became looser than it was?
A. Possibly a wee bit, but I saw him two or three days later, and that seemed to be in good condition, about the way I wanted it.
Q. About how much swelling was there in the leg when you first put the cast on?
A. I don't know, I cannot tell you that.
Q. After the swelling had subsided, how much
226 space was there between the cast and the leg?
A. I cannot tell you that, because I cannot get my finger up there where the ankle is when I have a cast on.
Q. You permitted him to walk on this cast?
A. No, I did not.
Q. At no time?
A. No.
Q. Was he on crutches?
A. Yes.
Q. If the patient had walked on that cast while it was in that condition, and while the cast was loose, that might have some effect upon the healing of the joint?
By Mr. Slater: Objection, your Honor. There is not any evidence that that was done in this case. It is purely supposition, not based on any facts.
By Mr. Irwin: I will take that back.

By Mr. Irwin:

Q. Is it usual and customary to put a man in the hospital, who has a fracture of that kind, and then keep him in bed?
A. It is not customary, no.
Q. This man was not in the hospital, except for putting on the cast?
227 A. That is right.
Q. And then he was sent home?
A. That is right, and instructed to come back and see me.
Q. And you do that with all fractures of this kind?
A. In this type of fracture I would do it again, yes.
Q. In a fracture of the internal malleolus, you would put the cast on, and send the man home?
A. Send him home and let him walk on crutches, so he would not step on it.
Q. This foot, when you came to take the cast off, the second cast off, and you turned him out, then you found that his foot was everted, did you not?

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A. No.
Q. Was his foot ever everted?
A. Not to my knowledge. He walked all right with it when I saw him.
Q. Did you ever put a pad in the bottom of his shoe?
A. No.
Q. Do you know any doctor for the company that did?
A. I understood one had been put in, but I did not know anything about it.
Q. You did not have anything to do with it?
A. I did not have anything to do with it.
228 Q. And if his foot was everted, that would be good practice, would it?
A. I never put them in for eversion.
Q. Did you find this fellow was walking on the inner side of his foot?
A. No. He walked all right when I saw him last.
Q. When did you examine him the last time?
A. The 28th of November, 1944.
Q. Would you say that there is a lateral slipping of the astragalus, amounting to three-eighths of an inch at present?
A. I would not say so, no.
Q. You had this man examined by Dr. Magnuson, did you not?
A. I didn't have anything to do with it.
Q. He was examined by the company?
A. I understood somebody had him examined by Dr. Magnuson, but it was not to my knowledge, I didn't have anything to do with it.
Q. Who is Dr. Magnuson?
A. He is an orthopedic surgeon in Chicago.
Q. One of the outstanding men in the United States?
A. He is a good man.
Q. Do you know where he is now?
229 A. I haven't any idea.
Q. Do you know whether Dr. Magnuson was the one who prescribed the pad on the inside of the heel?
A. I know nothing about what Dr. Magnuson said or did.
Q. Have you talked with Dr. Magnuson about this case?
A. No.
By Mr. Irwin: That is all.
By Mr. Slater: That is all.
(Witness excused.)

230 DR. WILLIAM LARMON, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Slater.

Q. Will you state your name, please?
A. William Larmon.
Q. Where do you live, Doctor?
A. 244 East Pearson Street, Chicago.
Q. You are a physician and surgeon, are you not?
A. Yes.
Q. Of what medical school are you a graduate?
A. Northwestern.
Q. Have you practiced continuously since your graduation?
A. Yes.
Q. What year did you graduate in?
A. 1941.
Q. Are you on the staff of any hospital?
A. At present I am a resident in Orthopedic Surgery at Wesley Hospital. I hold a Research in Teaching Fellowship at Northwestern Medical School.
Q. Will you tell us what a Research in Teaching Fellowship is, what does that mean?
231 A. It entails the teaching of medical students orthopedic surgery.
Q. Is that your specialty, orthopedic surgery?
A. Yes.
Q. Will you tell us just what the word "orthopedic" means?
A. Literally, it means "straight child." It is a division of surgery dealing with the bones, joints and muscles of the body.
Q. And does most of your work involve surgery?
A. Yes.
Q. You are on the operating staff at Wesley, did you say?
A. Yes, as a resident physician.
Q. Were you connected with the Chicago & North Western Railroad Company?
A. Yes, I was.
Q. How long were you connected with the Chicago & North Western?

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A. From some time in February, 1945, until October, 1945.

Q. And who was the company doctor during that time? Was Dr. Cutter the medical director?

A. Dr. Cutter was the medical director before that
232 time, and he died in February of that year, and I was appointed Acting Medical Director.

Q. Then you continued to act as Medical Director for the railroad until Dr. Miller came back from service, is that it?

A. That is right, yes.

Q. At that time were you on the staff of Passavant Hospital?

A. Yes, I was associated with Dr. Paul Magnuson at that time, professor of bone and joint surgery at Northwestern.

Q. Do you know the plaintiff in this case, Mr. Alfred S. Penn?

A. Yes, I do.

Q. Did you testify in the previous trial?

A. Yes, I did.

Q. Have you refreshed your recollection now in regard to Mr. Penn's condition?

A. Yes, I believe so.

Q. About when was it that you first saw Mr. Penn?

A. Some time in February, 1945.

Q. And where did you see him?

A. I believe it was at the Chicago & North Western dispensary.

233 Q. You made an examination of him at that time, did you not?

A. Yes, I did.

Q. Will you tell the Court and jury what you found when you made your examination of Mr. Penn?

A. Mr. Penn was complaining of pain in his ankle following an injury, and I examined his ankle at that time. He had a fracture of the medial malleolus in the ankle which had united by fibrous union.

The examination was essentially normal, except for some pain on extreme flexion and extension of his foot.

Q. I didn't get that. Some pain on extreme flexion and extension of his foot?

A. That is right.

Q. All right. What did you find about limitation of motion in his ankle?

A. He had about normal motion, as I recall.
Q. Have you examined X-ray pictures of Mr. Penn?
A. Yes.
Q. And did you examine those today here, before court?
A. Yes, I did.
Q. Will you state what you found from your examination of these X-ray pictures?
234 A. The X-ray showed a fracture of the tip of the medial malleolus of the ankle, which is united by fibrous tissue, apparently in approximately normal position.
Q. Did you find any pathology as far as the fibula is concerned on the other side, the opposite side from the malleolus, and is there anything abnormal about the fibula?
A. No, I do not think so.
Q. Did you prescribe anything for Mr. Penn, when you saw him?
A. I advised him to come into the Passavant Hospital, where I called Dr. Magnuson in consultation, and then I prescribed a Thomas heel, which is a heel to raise the inner side of the shoe, simply as a protection to the foot.
Q. Was there anything that you found from your examination, or from looking at these X-ray pictures, that would prevent this man from carrying on his regular duties as a railroad man, getting on the side of a box car, and lifting and walking and being on his feet?
A. No, I did not. He has a firm union.
Q. Would you say he would be able to carry on and do work of that character?
235 A. Yes, I think so.
Q. Is the weight-bearing axis or line affected in his left foot?
A. No, I do not think so, not through the ankle joint.
Q. Is there any weight that is supported by this tip of the malleolus?
A. No, there is not.
Q. That just comes down on the outside of the ankle joint, doesn't it?
A. Yes. The upper part of it acts as a stabilizing influence on the foot, to prevent it from turning inward.
Q. The upper part is not broken off, is it?
A. No, it is just the tip of it.
By Mr. Slater: That is all.

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Cross-Examination by Mr. Irwin.

Q. Just the tip of it?
A. Yes, about the lower half.
Q. When did you look at the X-rays? This noon, did you say?
A. Yes.
Q. Will you step down here, please? You say this part that was broken off is the lower half?
236 A. Yes. The malleolus extends up on the tip, up to about this point, and projects around the tip, and that does have a lateral, or rather, a medial piece of bone that holds the astragalus in place.
Q. The fracture is pretty much in line with the upper surface of the articular surface of the tip? That is right, isn't it?
A. It slants downward. It is certainly adequate coverage of that part of the bone.
Q. What is the part of the tip that acts as a stabilizer? Show us there in the photograph.
A. Just there. (Indicating.)
Q. That little tip there?
A. It is not probably all of the tip, but I think there is enough.
Q. How much more did this normally extend down? Half an inch, or three-quarters of an inch?
A. About half an inch.
Q. You made a clinical examination of this man, is that right?
A. That is right.
Q. You did not find anything the matter with him?
A. No. I found that he had pain.
Q. But so far as the foot is concerned, the foot was
237 normal, is that right?
A. No, he had a slightly flat foot.
Q. What else did he have besides the flat foot?
A. He complained of pain on extreme extension.
Q. What else did you find clinically beside pain to the foot?
A. I believe that was about all.
Q. You called Dr. Magnuson in consultation?
A. That is right.
Q. Dr. Magnuson is one of the outstanding orthopedic surgeons in America, is that right?

A. That is right.
Q. What is his position today?
A. He is Professor of Bone and Joint Surgery at Northwestern University.
Q. What position does he hold in the Government?
A. He is Consultant to General Volle in the Veterans' Administration.
Q. After consulting with Dr. Magnuson, you testified at the last trial, didn't you?
A. Yes, sir, I did.
Q. When you testified at the last trial, you put this pad in the shoe to correct the eversion?
A. That is right,—not to correct the eversion. To
238 help stabilize it.
Q. You did find an eversion in that foot, did you?
A. He was slightly flat-footed.
Q. Eversion is a different thing from a flat-foot, isn't it?
A. You can speak of eversion of the foot, as a term.
Q. You did find an eversion of the foot, then?
A. Yes.
Q. And you put in this pad in the shoe to assist him?
A. Yes.
Q. Because of the physical condition that you found in his foot?
A. Not entirely. I felt that that portion of the ankle should have support, to aid in his walking.
By Mr. Irwin: I think that is all, Doctor.
By Mr. Slater: That is all, Doctor. You may step down.
(Witness excused.)

239 HARRY R. FAIRCHILD, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Slater.

Q. Please state your name.
A. Harry R. Fairchild.
Q. It is hard to hear in here. F-a-i-r-c-h-i-l-d?
A. Yes, sir.
Q. And where do you live?
A. 315 Lawndale, Elmhurst, Illinois.
Q. You are employed by the Chicago & North Western Railroad as an engineer, are you not?

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A. Yes, sir.
Q. And you worked how long for the North Western?
A. Thirty years.
Q. Were you an engineer working in Yard 8, Proviso, on the 25th day of July, 1944?
A. Yes, sir.
Q. Did you see Mr. Penn get hurt?
A. I did.
Q. And you were operating the engine when he was a member of the switching crew?
A. Yes, sir.
240 Q. The engine was at what end of the cut of cars?
A. The west end.
Q. And it was headed west, too, was it?
A. Yes, sir.
Q. So that you were on what side of the engine?
A. Well, I was on the right-hand side of the engine.
Q. You would be on the north side of the engine, then, would you?
A. Yes, sir.
Q. You were getting signals from whom?
A. From the conductor.
Q. That was Wescott?
A. Yes, sir.
Q. And he was considerably east of you, wasn't he?
A. Quite a ways.
Q. When you started classifying these cars you had hold of, how many had you kicked out at the time the accident happened?
A. Oh, three or four.
Q. About how many did you have hold of at the time of the accident?
A. About fifteen cars.
Q. It was a bright, clear day, was it?
A. Yes, sir.
241 Q. Who was acting as the pin puller?
A. I didn't know his name at the time.
Q. Do you know it now?
A. Yes.
Q. What is it?
A. Mr. Penn.
Q. About where was he, what switch would you say he was at, or what was the nearest?
A. He was near the lead switch.

Q. Would he be near Switch 35?

A. Somewheres in there. That is where we were doing the switching.

Q. Will you tell us just what you saw?

A. Well, we were switching these cars, and the conductor always gives me a sign to kick them, and I will kick them, and then he gives me a stop sign, to stop the cars, and I will stop them.

At this particular time I got a kick sign, and I was kicking the cars, and I seen the brakeman, as they call him, running towards these cars, and the next thing I seen him, he stumbled and fell. When I seen that, I stopped the engine, and I got off the engine, and I came over to him, and I said to him, "Are you hurt?" He said, "Well,
I think I hurt my ankle." When I looked down, I
242 could see a bulge on this side of his foot (indicating),
so, by that time, there were a couple of more other fellows there, I guess the conductor came up, and the yard master, and I says, "You had better get him to a hospital", and I went back on the engine.

Q. Did you see him grab or hold on to, or operate the pin of this car, the lead car?

A. No, I did not.

Q. What is that?

A. No, I did not.

Q. As you would kick the cars out, would you bring the engine or your train to a complete stop each time?

A. When I got a stop sign I did, yes. On switching like that, we wouldn't do it, we would get a kick sign, and stop, and kick them right again.

Q. But you would keep moving the train back east all the time?

A. We would keep going east all the time.

Q. Did Mr. Penn say anything to you about the pin not pulling?

A. No, he did not.

By Mr. Slater: You may cross-examine.

243 *Cross-Examination by Mr. Irwin.*

Q. How many cars did you have in the cut at that time?

A. I would say about fifteen, a small cut.

Q. And cars are about 50 feet in length, on an average?

A. Some are 40 feet, most of them are.

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Q. Most of them are 40 feet?
A. Yes.
Q. That would be about 600 feet away?
A. It should be, yes.
Q. It would be at least 600 feet away, wouldn't it?
A. Yes.
Q. What?
A. Yes.
Q. Was the lead track straight?
A. At that particular place, yes.
Q. For what distance were they straight?
A. Well, they were straight all the way down the lead. The lead runs from 32 to 53.
Q. No curve in the track at all?
A. The curves are away down to the other end.
Q. Where is that curve with reference to the viaduct?
A. On the other side.
Q. Isn't there a curve west of the viaduct?
244 A. Not so very much, no.
Q. Do you recognize that scene in that photograph?
A. Yes, sir.
Q. That is a picture taken looking west from the viaduct, isn't it?
A. Well, you wouldn't know where the viaduct is here. The viaduct doesn't show here.
Q. It is taken from the viaduct itself, isn't it?
A. The viaduct doesn't show.
Q. That shows an electric wire right alongside the viaduct?
A. I don't know about that.
Q. That shows the lead where you were?
A. I am away up here (indicating).
Q. Yes. And there is a curve to the east of where you are, between you and the viaduct?
A. No. I am right on the straight track here.
Q. Doesn't the photograph show a curve in the lead track?
A. It is straight from here to the viaduct.
Q. But from the 32 switch west, it is curved, is it not?
A. I was working on a straight piece of track.
Q. When you shove the cars, the slack is in?
245 A. Yes.
Q. When you pull them, the slack is out?
A. Yes, sir.

Q. And you were shoving the cars?
A. Yes, sir.
Q. Do you say that Mr. Penn did not try to get the pin?
A. I seen him come towards the cars.
Q. You saw him come towards the cars?
A. Yes, sir.
Q. And then what did he do?
A. I seen him stumble and fall.
Q. What else did he do besides that?
A. That's all I knew.
Q. Didn't you see him try to get the pin?
A. No, I did not.
Q. Didn't he have some trouble getting the pin?
A. I didn't see him.
By Mr. Irwin: May I have his statement?

By Mr. Irwin:

Q. Isn't it a fact that Mr. Penn was having trouble pulling the pin?
A. No.
Q. You gave a statement, didn't you, of the happening of this accident to a claim agent of the company, Mr. 246 Warden, that gentleman sitting right down there? That is right, isn't it? Didn't you give a statement to Mr. Warden, the gentleman sitting to the side, behind Mr. Slater?
A. Yes.
Q. You told him all you knew about the accident?
A. I am telling you the same thing as I told him.
Q. He wrote it down, didn't he? He wrote it down, and you signed it, didn't you?
A. If he did, I must have, yes.
Q. That is your signature, isn't it?
A. Yes.
Q. Have you got your glasses on? Do you need glasses?
A. I don't have to need them.
Q. You had better put them on.
"He was having trouble pulling the pin,". That is right, isn't it? Is that what it says?
A. That is what it says there, yes.
Q. What did you mean by that? What did you mean by that, when you said he was having trouble pulling the pin? What did you see him do?
A. I seen him coming towards the car.

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Q. What did you mean when you said he was having trouble pulling the pin? What did you mean when you
247 said that? What did you see him do, that he was having trouble about it?

A. I seen him alongside the cars. I don't know what was the matter with him. Maybe he was falling behind.

Q. You said he was having trouble pulling the pin.

A. I wouldn't say for sure.

Q. You said in your statement he had trouble pulling the pin. I am trying to find out what you meant by that.

A. Maybe his back was toward me.

Q. What did you mean by that?

A. He was running alongside the cars.

By Mr. Irwin: That is all.

Redirect Examination by Mr. Slater.

Q. What did you think he was running alongside the cars for?

A. I suppose trying to pull the pin.

By Mr. Irwin: I object.

By the Court: Sustained.

By Mr. Slater:

Q. What did you see him do as he ran along beside the train?

248 A. My notion of what he was going to do was try to get the pin.

By Mr. Slater: That is all.

Recross Examination by Mr. Irwin.

Q. What was there about that that indicated he was having trouble?

A. I don't know. Maybe the man was up with the pin, or maybe he wasn't. I couldn't tell.

Q. Why did you say he was having trouble?

A. I was far enough back—if I was where I am talking to you now, I could see, but I was back ten car lengths, and I couldn't see him.

By Mr. Irwin: That is all.

Redirect Examination by Mr. Slater.

Q. Did you see Mr. Penn after the accident?
A. Yes.
Q. Did he say anything to you at that time about not being able to pull the pin?
A. No, he did not. He said he hurt his ankle, and "I don't think it is hurt very much", and I looked
249 down, and he had a bulge on his foot.
By Mr. Irwin: I object, your Honor. He wasn't asked anything about that.
By the Court: Sustained.

By Mr. Slater:

Q. Did he say anything to you about not being able to pull the pin?
By Mr. Irwin: I object to the question. It has already been answered.
By the Court: It has been covered.
By Mr. Slater: That is all.
By Mr. Irwin: That is all.
(Witness excused.)
By Mr. Slater: Can we take about a five-minute recess here?
By the Court: Yes.
We will take a short recess, ladies and gentlemen.
(A short recess was thereupon taken.)

250 CLIFFORD WHITAKER, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Slater.

Q. Will you state your name?
A. Clifford Whitaker.
Q. Will you try to keep your voice up, Mr. Whitaker, so everybody can hear you?
Where do you live?
A. 3553 Broadway.
Q. What is your business or occupation?
A. My business is an investigator, motion picture operator, and projector.

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Q. How long have you been employed in that business?
A. About eleven years.
Q. Have you been asked by the Claim Division of the Chicago & North Western Railroad Company to investigate this case of Alfred S. Penn?
A. Yes, sir.
Q. And did you do so?
A. Yes, sir.
Q. Do you recognize Mr. Penn here in court at the present time?
251 A. Yes, sir.
Q. Will you state where he is sitting? Where is Mr. Penn sitting?
A. That is Mr. Penn, the last man over there.
Q. In the back row there, to the right of the fan?
A. Yes, sir.
Q. Did you take motion pictures of Mr. Penn?
A. Yes, sir, I did.
Q. Where did you take the motion pictures?
A. Well, I obtained motion pictures near the Jefferson Electric Company, and in and around Maywood.
Q. Do you remember the dates when you took these motion pictures?
A. Well, the first pictures were taken on November 24.
Q. I am sorry, Mr. Whitaker. It is hard for me to hear. November 24, did you say?
A. Yes, sir.
Q. What year was that?
A. 1945.
Q. The first pictures were taken on November 24, 1945. When was the next picture taken?
A. November 25, 1945.
Q. And the next?
A. November 26, 1945.
252 Q. Three days, the 24th, the 25th, and the 26th; is that right?
A. Yes, sir.
Q. Will you tell us how many feet were taken on each occasion?
A. The first day—
Q. Do you have a record with you that would set forth the number of feet?
A. I am sorry, I am afraid I would not be very accurate on the footage unless I referred to my notes.

Q. Do you have a record of that?
A. Yes.
Q. Will you tell me now how many feet you took on November 24, 1945?
A. I obtained 10-foot at 3:35 p.m. on that date, and 15-foot at between 4:00 and 4:15, and 5-foot at 5:35 p.m. on that date.
Q. Making a total of how many feet on that day?
A. That would be 30 feet.
Q. Where were those pictures taken on that day?
A. The 10-foot taken at 3:35 was taken in Bellwood, opposite the Jefferson Electric Company, across the street from the Jefferson Electric Company.
Q. Is that where he was working at the time?
253 A. Yes, sir.
Q. Where was the next footage taken?
A. As Mr. Penn went home from work on that day, going home.
Q. And the next pictures that were taken that same day, the 24th?
A. After Mr. Penn got home, he came down the steps of his house.
Q. Did you take pictures at that time?
A. Yes, sir, I obtained 5-foot.
Q. Did Mr. Penn limp at the times when you took those pictures?
A. No, he did not.
Q. The next date you have given me is November 25, 1945.
A. Yes, sir.
Q. Will you tell me when you took those pictures, where you took them, and how much you got on each one, on the 25th?
A. If my recollection is right, that was on a Sunday, Mr. Penn did not work. At 3:30 p.m., I obtained 10-foot of pictures of him walking to the store and back.
Q. And when did you take the next pictures on that day?
A. That was at 4:00 p.m. following, he apparently
254 took some clothes out of his car, and walked around the side of the house, and went in the back yard, and at 4:30 p.m. he came out and got into his car, I obtained 5-foot more.
Q. 5-foot more then?
A. Yes, sir.

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Q. Did he limp at any time when you took those pictures?

A. No, sir.

Q. You took some pictures of him on November 26, 1945?

A. Yes, sir.

Q. Will you state when and where, and the number of feet you took on that third day?

A. At 3:45 p.m., Mr. Penn came out of the Jefferson Electric Company with another man, apparently an employee there, and came to his car, and changed the tire on the car, and I obtained 60-feet of pictures of him changing the tire.

At 4:00 p.m., I obtained 75-feet of pictures of him pushing the car.

Q. I didn't get that. Pushing the car, did you say?

A. Yes, sir, pushing on the car.

Q. Did you take movies of him doing that?

A. Yes, sir.

255 Q. Did you take any more on that day?

A. Yes, sir. They pushed the car, oh, I would say about one block in all, and I obtained 75-foot of him pushing the car.

And at 4:30, if I may go into detail, they pushed the car down to First Avenue, in Bellwood, where someone gave them a shove, and shoved the car north on Bellwood, and then they drove north on Bellwood to Lake Street about a block north of Lake Street, on 25th Avenue, out of Bellwood and into Maywood, and stopped, and Mr. Penn walked across the street and went into a house, and as he came back, I obtained 10-foot more of pictures of him walking across the street.

Q. Did he limp at any time when you took those pictures?

A. No, sir, he did not.

Q. All right. You have told us about the footage you have taken. How much does it total up to?

A. Well, after Mr. Penn came back and got in the car, he drove home.

Then, at 4:45, he walked up to 25th Avenue in Maywood and sort of stood on the corner, and I obtained 5-foot more to finish up the 200 feet of motion pictures.

Q. 200 feet in all, then, is that right?

A. Yes, sir, that is all I took.

256 Q. What kind of a camera did you have?

A. Bell & Howell.
Q. Is that a standardized, recognized make?
A. Yes, sir.
Q. Was it in good working condition at the time?
A. Yes, sir.
Q. What models of Bell & Howell make did you have?
A. My camera is a Bell & Howell 16 millimeter magazine loading camera.
Q. How many feet of film can you get into the camera?
A. The magazines hold 50-foot each.
Q. Then do you have four such films?
A. Yes, sir.
Q. And after these pictures were taken, what did you do with the film?
A. After the pictures was taken, I drove to 1712 South Prairie Avenue, the Eastman Laboratories, and left the film for development.
Q. Did you later get the film?
A. Yes, sir, I called for them later.
Q. And did you run off the pictures afterwards?
A. Yes, sir.
Q. And are you able to state whether the pictures correctly show what was seen by you and what transpired 257 at the time the motion pictures were taken?
A. They were exactly as I took them.
Q. What about the speed of the camera at the time the pictures were taken, of your camera, on that occasion?
A. The speed of my camera is set and locked at 16 frames per second,—
By Mr. Irwin: How many?

By the Witness:

A. (Continuing) —which, taken at normal speed,—

By Mr. Slater:

Q. Did you say 16 frames?
A. 16 frames a second.
Q. Is that normal speed?
A. That foot rate is normal speed, yes, sir, normal action.
Q. After you got the four rolls of film, what did you do with them? Are they separate rolls, or have you put them together?
A. Well, it seems to be customary to take the 50-foot film and link it together into one roll.

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Q. Did you do that?
A. Yes, sir, I did.
Q. Is there something more on that roll besides the
258 200 feet, consisting of four 50-foot films?
A. Yes, sir, there is.
Q. What is that?
A. That is pictures not taken by me.
Q. By whom were those pictures taken?
A. Those pictures were taken by Victor Bowen.
Q. How do you spell his name?
A. B-o-w-e-n.
Q. When were those pictures taken?
A. Those pictures were taken on June 1st.
Q. What year? 1945?
A. 1946.
Q. 1946?
A. Yes, sir.
Q. And where were the pictures taken?
A. The pictures were taken in Des Plaines, Illinois.
Q. Where were they taken there?
A. They were taken about a half a mile east of the main part of town, on Dempster Street, at an old foundry building.
Q. What did you and Mr. Penn do, if anything, on that occasion?
A. Well, he clumb up and down a ladder, and walked around over the top of the building, and clumb over
259 the parapet in the building, and jumped over, and so forth.
Q. Did Mr. Penn get around with any limp or disability of any kind at that time?
A. I did not notice any disability whatever.
Q. Did he limp at that time?
A. No, sir.
Q. What did he do with the ladder?
A. Well, he clumb up the ladder, of which the steps were quite far apart, especially one step that was missing, and after he clumb up the ladder and got on top of the roof of the building, he pulled the ladder up, he pulled it up on top in order to use it to get up on a higher part of the building, he lifted the ladder up, and carried it.
Q. What camera did Mr. Bowen use on that occasion?
A. Mr. Bowen used my camera, the same camera that took the before-mentioned pictures.

Q. Do you know what experience Mr. Bowen has had in taking these pictures?

A. I don't know all of his experience. I know that he has had experience in the Army, and as a commercial photographer.

Q. After the pictures were taken, did you get the camera again?

260 A. Yes, sir.

Q. And what did you do with the film that Mr. Bowen took?

A. Well, I took the film, the expired film that Mr. Bowen had taken, to the Eastman Laboratories on the following day for development.

Q. Did you get that after it was developed?

A. Yes, sir.

Q. And have you seen those pictures?

A. Yes, sir.

Q. Do they correctly portray what transpired there that afternoon on June 1st, at Des Plaines?

A. Yes, sir.

Q. What did you do with that film after you obtained it from Eastman?

A. Well, after I obtained the film from Eastman, I connected the 50-foot lengths with the original film that I had taken, and made one roll out of the total 400-foot.

Q. There is a total of 400-feet on it, is there?

A. Yes, sir.

Q. Is this film that you now have, here in court? Do you have the film in court now?

A. Yes, sir.

By Mr. Slater: Will you mark that film as Defend-
261 ant's Exhibit No. 10?

(Said film was marked Defendant's Exhibit 10, for identification.)

By Mr. Slater:

Q. Can these moving pictures be inspected here in court with the use of a screen, projector, and darkened room?

A. Yes, sir.

Q. Do you have such a screen and projector here at the present time?

A. Yes, I have.

Q. Is there a normal speed for the projector?

A. Yes, sir.

Q. What is the normal speed?

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A. The normal speed of the projector is just above the flicker.

Q. Have you fixed it at a normal speed at the present time?

A. No. The camera takes the pictures at 16 frames per second, which will portray the pictures at the normal speed of the projector at just above the flicker.

Q. Is the projector now fixed so that it operates just above the flicker?

A. It has to be operated according to the current of
262 the building.

Q. Are you able to do that?

A. Yes, sir.

Q. Will the projection as shown on the screen of this roll of moving pictures be accurate?

A. Yes, sir.

Q. You are prepared to do that now, then, are you?

A. Yes, sir.

By Mr. Slater: I have the other witness who took half of the film here in court, and before I show the pictures I want to put that other witness on the stand.

Cross-Examination by Mr. Irwin.

Q. You did not develop the picture?

A. No, sir, I did not.

Q. You were not present when it was developed?

A. No.

Q. Are these pictures in color, or in black and white?

A. In black and white.

Q. Are there any cuts?

A. No, sir.

Q. The films are now in 50-foot lengths?

263 A. Yes, sir, that is right.

Q. You have inspected them, and made sure that is a fact?

A. Yes, sir.

Q. There are eight films in one continuous sequence?

A. In one roll.

Q. Is that right?

A. That is right.

By Mr. Irwin: I would like the privilege of examining the films to see whether there are any cuts in them at some time, your Honor.

By the Court: Very well. Call your next witness.
By Mr. Slater: Will you step down?
By Mr. Irwin: By the way, one other thing:

By Mr. Irwin:

Q. Are these all of the films that were taken?
A. Yes, sir, they are.
Q. And there are no parts that have been cut out of any film?
A. No, sir.
Q. Not one picture?
A. No, sir.
By Mr. Irwin: All right.

264 V. C. BOWEN, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Slater.

Q. Please state your name?
A. V. C. Bowen.
Q. B-o-w-e-n?
A. Yes, sir.
Q. Where do you live?
A. 6444 North Bell, Chicago.
Q. What is your business or occupation?
A. Motion picture photographer.
Q. For whom do you work?
A. For myself.
Q. How old a man are you?
A. Forty.
Q. How long have you been in the motion picture business?
A. About eight years.
Q. Have you operated your own company all during that time?
A. That is right.
Q. Have you been away from that business for
265 part of the time?
A. Part of the time I was in the Service.
Q. When were you in the Service?
A. From August, 1943, until the middle of October, 1945.

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Q. And did you do any work in connection with photography while you were in the Army?

A. I was a motion picture photographer in the Army.

Q. Where did you take pictures?

A. Well, we took pictures of a number of camps in the United States, and in the European Theater, France, Germany, and also in the Pacific theater, and Manila.

Q. What sort of a camera did you use while you were in the Army taking pictures in the various parts of the world?

A. A Bell & Howell 35 millimeter, an Eastman 16 millimeter, and a Mitchel 35 millimeter.

Q. Were you asked to take moving pictures of Mr. Penn, the gentleman who sits here at this table, and of Mr. Whitaker?

A. Yes, I was.

Q. And did you take such pictures?

A. I did.

Q. When did you do it?

266 A. The 5th of June, 1946.

Q. And where did you do it?

A. In Des Plaines, at an old foundry building near the center of Des Plaines.

Q. About what time of day was it?

A. Oh, between 4:30 and 6:30 in the afternoon.

Q. And whose camera did you use?

A. I used Mr. Whitaker's camera.

Q. What did you see Mr. Whitaker and Mr. Penn do at the time you took the pictures?

A. Well, they apparently were measuring this factory building, they took a ladder and climbed up on the roof, and walked over the roof, and measured certain distances.

Q. And what did you see Mr. Penn do with the ladder, if anything?

A. He climbed the ladder in the first place, and got on the roof, and pulled the ladder up after him, and set it over an adjacent wall, and climbed up another roof.

Q. What was the roof like? Was it a flat roof, or what?

A. Beg pardon?

Q. Was it a flat roof you are talking about?

A. No, it was a slanting roof, a slight slant to it.

Q. Did Mr. Penn walk with a limp during that time?

267 A. No.

Q. Then after you took the pictures—was the camera set at normal speed?

A. Yes, sir.

Q. After the pictures were taken, what did you do with the camera?

A. I took the camera and film home with me, and Mr. Whitaker picked it up that evening about 8:30.

Q. Have you since seen the pictures displayed?

A. I saw the pictures last night.

Q. Do they accurately portray what transpired at the time you took the pictures?

A. Yes, they do.

Q. Did you take 200 feet?

A. 200 feet.

Q. Is that combined with some other footage?

A. It was combined with 200 feet that Mr. Whitaker previously shot.

Q. And this reel here, which is Defendant's Exhibit 10 for identification, will you examine this and tell us whether this is the reel that includes the 200 feet you took?

A. I believe it is. I cannot see very well.

Q. Will you hold it up in front of the light here, 268 and tell us whether this is what you took?

A. Yes, that is it.

By Mr. Slater: All right. You may cross-examine.

Cross-Examination by Mr. Irwin.

Q. You took your pictures in June of 1946?

A. That is right, sir.

Q. And the other pictures were taken in November?

A. Beg pardon?

Q. The other pictures were taken in November, 1945?

A. I don't know when they were taken.

Q. They were taken before you took your pictures?

A. I don't know about that, either. All I know is the pictures I took.

Q. If the pictures that you took were first, they would appear at the outer end of this—if taken last, they would appear at the outer end of this film?

A. That is right. The spool has not been rewound.

Q. It has or has not been?

A. It has not been, the pictures I took are on the end of the reel.

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Q. How do you know they have not been rewound?

A. I can tell.

269 Q. What do you mean you can tell? How can you tell? Tell what?

A. I can tell that the pictures I took are on the outside of that reel.

Q. How do you know it has not been rewound?

A. Well, if the previous pictures were in order, if the previous pictures should be first on the reel, they should be on the outside of the reel now, and mine are on the outside of the reel now.

Q. Yours are now on the outside?

A. That is right.

Q. And the other pictures, that were taken first, they should have been on the outside?

A. Yes, sir.

Q. You don't know how your pictures happen to be on the outside there, do you?

A. No, sir.

Q. Were there any cuts made in those films?

A. Not that I know of.

Q. Were you present at the time the pictures were taken in November, 1945?

A. No, sir.

Q. Those are the only pictures that were taken?

A. I don't understand you.

270 Q. Those pictures that you took, that appear here in this film. Is that right?

A. Are the only pictures that I took?

Q. Yes.

A. That is right.

Q. You took none other than these?

A. That is right.

Q. And these are without any deletion?

A. Right.

Q. Nothing has been cut out?

A. No, sir.

Q. The films are intact?

A. Right.

By Mr. Irwin: That is all.

I wanted to ask Mr. Whitaker one question.

271 CLIFFORD WHITAKER, called as a witness on behalf of the Defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination by Mr. Irwin (Continued).

Q. These pictures were taken by you on November 24, 25, 26, in the year 1945?

A. Yes, sir.

Q. This case was tried before his Honor, Judge Barnes, in this courtroom, on January 9, 10, and 11, of 1946. That is right? Do you know anything about it?

A. I don't know anything about that.

Q. You did not testify upon the other trial of this lawsuit, did you?

A. No.

Q. You did not bring these films into court and demonstrate them upon the other trial of the case, although those pictures had been taken at that time?

A. No.

Q. What?

A. No, I did not.

Q. Did you know that the case was being tried in January of 1946?

272 A. I didn't know the case was being tried, no, sir. I was not notified.

By Mr. Irwin: That is all.

By Mr. Slater: That is all.

I offer to show these pictures now, your Honor.

By the Court: Proceed.

(Moving pictures shown on screen.)

By Mr. Slater: Will you take the stand again?

Redirect Examination by Mr. Slater.

Q. Mr. Whitaker, did you have any talk with Mr. Penn about getting a job and doing manual labor of any kind?

A. Yes, sir, I did.

Q. When did you have that talk?

A. March 26th.

Q. What year?

A. 1946.

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Q. And where did that talk take place?
A. Well, this took place in Ding & Fuzzie's Tavern.
Q. Where is that located?
A. It is located in North Lake Village.
Q. About what time of day was it?
273 A. About 4:00 o'clock.
Q. What did you say to him, and what did he say to you with reference to getting a job, as close as you can remember what you said to him, and then what he said to you?
A. I asked Mr. Penn if he would like to work or have a job with the same company that I was working for, and he said well, at present he had to lay low until after his case was settled, then he could do anything as he pleased.
Q. Do you know the gentleman who sits across from me here, Mr. James Kraman?
A. No.
Q. You do not?
A. No, I don't know him.
By Mr. Slater: I believe that is all.

Recross Examination by Mr. Irwin.

Q. What is your business?
A. Investigator.
Q. You mean you are a detective?
A. No, sir.
Q. You do detective work, is that it?
274 A. No, sir.
Q. What do you call this work?
A. Well, investigation work.
Q. You do this same type of work for other lawyers?
A. No, sir.
Q. Do you do it for other companies?
A. Yes, sir.
Q. What other companies do you do this work for?
A. Rock Island Railroad.
Q. What other railroad?
A. New York Central.
Q. What other railroad?
A. Burlington.
Q. What other railroad?
A. Well, that's about all.
Q. Whenever an employee is injured, and has a damage suit against the railroad company, it is part of your job to go around and try to get something on the man, is that it?

A. No, sir. I am asked to go out on questionable cases and try to learn the truth as to what the physical disability is.

Q. Did you have any job for this man when you talked to him in March?

275 A. I don't exactly understand you, counsel.

Q. You said you talked to him about getting a job, working.

A. Yes, sir.

Q. Did you have any job in mind for this man?

A. Yes, I did.

Q. Where?

A. Well, at climbing around over buildings.

Q. Where?

A. Climbing around over buildings.

Q. Climbing around what buildings?

A. Well, any building I could find.

Q. For whom?

A. For anybody I could find.

Q. In other words, you were laying a trap for this man, is that right?

A. No, sir, I just wanted to learn the truth—

Q. You were laying a trap for this man? Is that right?

A. (Continuing)—regarding his physical disability.

Q. You were laying a trap for this man; is that right?

A. No, sir.

Q. What do you call it?

A. I wanted to learn the truth.

Q. Did you tell this man you were a detective, trying

276 to get something on ihm?

A. No, sir.

Q. This man believed you were giving him a legitimate job, didn't he?

A. I don't know whether he did or not.

Q. How much are you paid for this kind of work?

A. $10.00 a day.

Q. Anything else goes with that?

A. And expenses.

Q. And how much are your expenses?

A. They vary, they are different.

Q. Do you spend your time doing this kind of work?

A. Yes, sir.

Q. And do these other railroads pay you the same amount of money?

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A. Yes, sir.
Q. How much did you make last year doing this kind of work?
A. I don't know.
Q. Do you know of any reason why you didn't testify upon the last trial?
A. I was not called upon. That is all the reason I know.
Q. Although you had taken these pictures?
A. Yes, sir.
277 Q. For the railroad company?
A. Yes, sir.
Q. Did you talk with Mr. Slater about this?
A. I don't believe I did.
Q. Did you talk with the gentleman behind him about it?
A. No, sir.
Q. Who was it that hired you to do this work?
A. Mr. Winn.
Q. Mr. Winn was the Chief Claim Agent of the railroad company, wasn't he?
A. Yes, sir.
Q. And he knew that you were doing that, did he?
A. Yes, sir.
By Mr. Irwin: I believe that is all.
By Mr. Slater: That is all.
(Witness excused.)
By Mr. Slater: The Defendant rests.
Whereupon the defendant rested its case.
278 And thereupon the plaintiff, to further maintain the issues on his part, introduced the following evidence, to-wit:—
By Mr. Irwin: I desire to read, your Honor, Rule 806 of the Book of Rules.
By Mr. Slater: Objection, on the ground that the man—well, I will withdraw the objection. No objection.

By Mr. Irwin (Reading):

"When persons are injured while coupling or uncoupling cars or in getting on or off the cars, whether passenger or freight, or in any other way in which the accident may have been caused by appliances or machinery, the cars, appliances or machinery must be immediately examined by the person in charge or by the agent to ascertain their condition and a report made of the inspection on form 751 giving the numbers and initials of cars examined and the names of the persons making the inspection. The superintendent or

his assistant will then notify the inspector at the first division terminal, who will also examine the machinery, cars or appliances, and make report on the same form. When an accident is caused by defective machinery or by
279 the breaking of machinery, appliances or rails, the broken or defective parts must be so marked as to be readily identified and immediately turned over to the superintendent or his assistant and by him forwarded to the general claim agent."

And I desire to read portions that Mr. Slater did not read of the statement signed by the plaintiff November 15, 1944, marked Defendant's Exhibit 5, and given to the claim agent of the railroad company, H. E. Ballou:

"I thought that this speed was a little faster than usual"—

By Mr. Slater: May I find out just where you are starting to read?

By Mr. Irwin: A little past the middle of the first paragraph:

"I thought that this speed was a little faster than usual although it was proper switching speed. It may be that the trouble I was having pulling the pin gave me the impression that the speed was higher because I was having a little trouble."

Then, in the next—

By Mr. Slater: You did not read the last sentence.
280 I thought you were going to read everything in between, also.

By Mr. Irwin: You read excerpts, and I am reading parts. I can read it all. You didn't read that he said he was pulling the pin. You left that out.

By Mr. Slater: Just so we understand what you are doing.

By Mr. Irwin: You understand it.

And then he said:

"I had plenty of chance to pull the pin"—

By Mr. Slater: What paragraph is this?

By Mr. Irwin: Next to the last.

By Mr. Slater: Down at the bottom of the page?

By Mr. Irwin: Commencing "I got on this car."

"I had plenty of chance to pull the pin and work without being hurried, had I been successful at pulling the pin while riding on the car, but when I could not pull the pin and had tried for some time, I was losing time and distance all the

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time, so that at the end when I had to get off and pull the pin I had to act with more haste."

And then I offer in evidence, as Plaintiff's Exhibit No. 2, a portion of the statement made by R. P. Klasen to Edward C. Kett, on July 25, 1944:

281 "Q. 8. Describe how the accident occurred," then follows:

"All I know about this accident is that when I looked up he was hobbling away from the cut of cars on the yard 8 lead over to a bench located under Wolf Road Bridge."

By Mr. Slater: You are not reading the balance of this answer that the witness made, is that right?

By Mr. Irwin: You may read it. This man said he saw him stumble.

And then Mr. A. L. Wescott, in a statement given to Edward C. Kett, Claim Agent, on July 25, 1944:

"8. Describe how the accident occurred," and then it says:

"He was pulling pins, and was running along with the cut and was trying to pull pin on car, which he did, and just as he pulled the pin he made a misstep like he was stepping in a hole and he walked away limping."

Then the statement of Harry Fairchild, which is marked Plaintiff's Exhibit 3 for identification. It is dated December 28, 1945, made to Edward Warden.

282 "He was having trouble pulling the pin,"—

By Mr. Slater: What part of the statement, please?

By Mr. Irwin: That is in the middle of the fourth paragraph.

By Mr. Slater: Does that begin a sentence?

By Mr. Irwin: "He was having trouble pulling the pin," —yes.

By Mr. Slater: That is not even the whole sentence you are reading, is it?

By Mr. Irwin: Why, yes, that part of it. If you want to read any more, it is up to you.

By Mr. Slater: I submit, if he is going to read it, he has to read the whole sentence. I object to his reading a fraction of a sentence into evidence.

By the Court: You can read the rest of it.

By Mr. Slater: All right. (Reading:)

"He was having trouble pulling the pin, because of the slack being out and he seemed to jump into the air to get the pin and then stepped on this switch. I would say that

we were switching at the usual speed for this type of work."

By the Court: Anything further?

283 By Mr. Irwin: I think that is all, your Honor. Plaintiff rests.

Whereupon the Plaintiff rested his case.

By Mr. Slater: We have nothing further.

Whereupon the Defendant rested its case.

By the Court: Both sides rest?

By Mr. Slater: That is right.

By Mr. Irwin: Yes, your Honor.

By the Court: We will recess at this time, ladies and gentlemen, until 10:00 o'clock tomorrow morning. In the meantime, I recall to your minds what has been heretofore said to you about talking about the case, or permitting anyone to talk to you about it. Do not talk about it.

I further suggest to you that you refrain from reading anything that may appear in the newspapers concerning this case. I know it is the desire of each and every one of you to be a fair and impartial juror, I know that you want to decide this case on the evidence heard in open court, and under the instructions of the Court. I

284 know that is your intent. In order that you may do that, in order that you may have a feeling of satisfaction with what you may do, in after years, I suggest that you refrain from reading anything that appears in the newspapers about this case, if anything does appear.

Return here at 10:00 o'clock tomorrow morning.

(Whereupon the jury retired from the courtroom, and the following proceedings were had outside the presence of the jury:)

By the Court: How much time do you gentlemen want?

By Mr. Slater: I would like a half hour, your Honor.

By Mr. Irwin: I should think half an hour would be sufficient.

By the Court: Have you the instructions?

By Mr. Irwin: I have, your Honor. (Handing papers to the Court.)

By Mr. Slater: I have a motion, your Honor, and an instruction:

(Said motion and instruction being in the words and figures following to-wit:)

285 By Mr. Slater: I would like to point out at this time that there is a variance in the complaint and the

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proof. The complaint alleges the coupler failed to operate. The proof, undisputed, on plaintiff's own testimony, shows the coupler did operate when he cut off the car, and on defendant's testimony that he did not touch the pin; so that, as far as the complaint about the section being violated, and the car not being cut off, I think there is a failure of proof, and a variance between the complaint and the evidence.

By the Court: No, I do not think there is any variance. What has heretofore been dismissed out of this case?

By Mr. Irwin: All but the first paragraph.

By the Court: "A"?

By Mr. Irwin: "A" remains in.

By Mr. Slater: I have my instructions here, your Honor.

By the Court: I am going to deny this motion, and I am marking it "Denied".

I am refusing the tendered instructions, and I am marking it "Refused".

I will take up with you in the morning, gentlemen, 286 these instructions.

By Mr. Irwin: I notice in your motion you include Paragraphs A, B, and C. B and C have already been dismissed of record, as I understand it.

By Mr. Slater: I had to type this out a little bit before I started trying the case.

By the Court: Do you want this special interrogatory submitted?

By Mr. Slater: Yes, your Honor.

By the Court: Any objection to the special interrogatory?

By Mr. Irwin: I have not seen it, your Honor.

By the Court: We will take it up in the morning.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. of the following day, Thursday, October 10, 1946.)

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Chicago, Illinois,
October 10, 1946,
10:00 o'clock a.m.

Met pursuant to adjournment.

Present:

Mr. Irwin.

Mr. Slater.

And thereupon the following further proceedings were had herein:—

By the Clerk: 45 C 1148. Penn against Chicago and North Western Railroad Company, on trial.

By the Court: Step into chambers, gentlemen.

(And thereupon the Court, Counsel for the respective parties, and the Official Reporter retired into chambers, where the following further proceedings were had herein, out of the presence and hearing of the jury:)

By Mr. Slater: I handed you the wrong papers.
288 I would like to have that one marked at the close of the plaintiff's evidence; the one I handed you, that you marked, was the one at the close of the plaintiff's case. I would like to hand you this one at the close of all the evidence.

By Mr. Irwin: Is it the same as the other?

By the Court: Yes, last night.

By Mr. Irwin: You marked it last night, denying my motion for a directed verdict, and refusing the instruction. I handed you the wrong one. The motion was the one at the end of the plaintiff's case. And this one is after all the evidence is in.

By the Court: You want to let the other one ride?

By Mr. Slater: I want that one. I think it is an apt motion to make.

By the Court: Did you reserve your right to make it?

By Mr. Slater: I had reserved my right to make it. He had gotten his evidence in, and I proceeded to put mine in anyway.

By the Court: Well, I will act as I did yesterday. It is in the same terms, is it?

By Mr. Slater: Yes, except that it says at the close of all the evidence.

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(Which said motions, and said instructions tendered
289 and requested by the plaintiff, are in words and figures as follows:)

290 Now, in addition I have changed my special interrogatory. I read it over last night and rewrote it. And I would like to take back the carbon copies and destroy them so that we won't get it confused.

By the Court: Have you read these instructions?

By Mr. Slater: Yes.

By the Court: What about A?

Mr. Slater: No objection to A.

By the Court: B.

By Mr. Slater: B I think is a duplicate of A.

(Said proposed Instruction B, tendered by the plaintiff, is as follows:)

You are instructed that it is provided by the Federal Employers Liability Act that every common carrier by railroad, while engaging in commerce between any of the several States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employe, to his personal representative for the benefit of the surviving widow of such employe, for such injury or death resulting in whole or in part from the negligence of any of the
291 officers, agents or employes of such carrier.

Any employe of a carrier any part of whose duties as such employe shall be in the furtherance of interstate commerce, or shall in any way directly or closely and substantially affect such commerce as above set forth, shall be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this law.

By Mr. Slater: On the face of it it is more or less a recital of the provisions of paragraph 51 of Section 2 of the Chapter on violations of the Safety Appliance Act.

This refers to the "personal representative for the benefit of the surviving widow." And I think everything is covered by A, inasmuch as contributory negligence is not a defense. And I think you have got that covered by saying that if those things are proved, in the summarizing instruction, the plaintiff is entitled to recover.

And I do not deny interstate commerce. And the last paragraph says that the plaintiff is entitled to come under

the provisions of the Federal Act. That is not in issue.
292 I do not think it has any application to the issues in this suit under the Safety Appliance Act.

By Mr. Irwin: In the second paragraph, strike out "interstate commerce".

By Mr. Slater: The first paragraph has it, too.

By Mr. Irwin: That part of the first paragraph in the sixth and seventh lines,

"or, in the case of the death of such employe, to his personal representative for the benefit of the surviving widow of such employe,".

By the Court:

"or, in the case of the death of such employe, to his personal representative for the benefit of the surviving widow of such employe,".

By Mr. Irwin: So far as the rest of it is concerned that has to do with the old case of Rigby. And they say that the two are pari materia; and the suit is really brought under the Federal Liabilities Act for the benefit of the Safety Appliance Act.

By Mr. Slater: In the first instruction you have got everything in there, unless you want the jury told that the plaintiff is entitled to recover because he is suing under the Federal Act. That is my objection.

By the Court: This tells them what the law is. I think B as modified is all right.

293 By the Court: C.

(Plaintiff's proposed Instruction C is as follows:—)

"A railroad company engaged in interstate commerce has the duty not only to provide automatic couplers on cars coupling automatically upon impact, but to keep them in such operative condition that they will always perform their functions, and the test of compliance with the law is the operating efficiency of the couplers with which cars are equipped."

By Mr. Slater: C I object to because it says the railroad must—"has the duty* * * to provide couplers," not only that "duty," "but to keep them in such operative condition that they will always perform their functions."

That refers to cars coupling automatically. It is a question whether they would uncouple.

And in the second place to say that they must always do that disregards the fact that they are not supposed to do

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it—you are not supposed to pull the pin when the slack is out. And this indicates to the jury that you always must be able to do it.

My point is that a pin is supposed to be pulled only when the slack is in. There is no defect in a coupler
294 because the pin cannot be pulled when the slack is out. This implies that you must always be able to uncouple the car.

By Mr. Irwin: That was taken from the 244 United States page 65, a coupler case—a case quite similar to this.

By Mr. Slater: An instruction there of this general language?

By Mr. Irwin: That there should be an instruction—I think it is the same as that, in the U. S. 244—it is page 66, instead of page 65.

It is an opinion by Mr. Chief Justice White; *Minneapolis and St. Louis Railroad Company* v. *Gotschal, Administratrix*:

"The jury, under an instruction of the court, was permitted to infer negligence on the part of the company from the fact that the coupler failed to perform its function, there being no other proof of negligence. It is insisted this was error, since as there was no other evidence of negligence on the part of the company the instruction of the court was erroneous as from whatever point of view looked at it was but an application of the principle designated as res ipsa loquitur, a doctrine the unsoundness of which, it is said, plainly results from the decisions in *Patton* v.
295 *Texas & Pacific Ry. Co.*, 179 U. S. 658 and *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480. We think the contention is without merit because, conceding in the fullest measure the correctness of the ruling announced in the cases relied upon to the effect that negligence may not be inferred from the mere happening of an accident except under the most exceptional circumstances, we are of opinion such principle is here not controlling in view of the positive duty imposed by the statute on the railroad to furnish safe appliances for the coupling of cars."

By the Court: Let's pass on to D.

(Plaintiff's proposed Instruction D is as follows:)

"You are instructed that in an action brought against a common carrier by railroad to recover damages for personal injuries to one of its employes, if it shall appear from the preponderance of the evidence that the violation by

such carrier of any statute enacted for the safety of its employes as alleged in plaintiff's complaint proximately contributed to the injury of such employe, and if it
296 shall further appear from the preponderance of the evidence that the employe at the time of receiving the injury, if any, was engaged by such common carrier by railroad in transportation between any of the several states, the employe shall not be held to have been guilty of contributory negligence nor to have assumed the risks of his employment."

By Mr. Slater: D is objectionable in that it assumes a violation of the statute, I mean in the first few lines, "in an action brought against a common carrier by railroad"

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"If it shall appear from the preponderance of the evidence that the violation by such carrier."

That assumes that there was a violation by the carrier.

By Mr. Irwin: That is what the law says.

By Mr. Slater: You have got first to prove that there was a violation. You assume a violation in that instruction.

By Mr. Irwin: This is not a peremptory instruction. This is as to the law. However, we could put in, "that the violation if any."

By Mr. Slater: "if any" after the word "violation"?
297 By Mr. Irwin: Yes.

By the Court: Any other objection?

By Mr. Slater: No, that is all.

By the Court: E.

(Plaintiff's proposed instruction E is as follows:)

"If you believe from a preponderance of the evidence that the coupler on the car in question was defective in that the same could not be coupled by means of the pin lifter, and that the plaintiff at the time he was injured was attempting to uncouple said coupler and was injured as a direct and proximate result of said alleged defective condition thereof, you should find the defendant guilty."

By Mr. Slater: E.

"If you believe from a preponderance of the evidence that the coupler on the car in question was defective in that the same could not be coupled by means of the pin lifter, and that the plaintiff at the time he was injured was attempting to uncouple said coupler and was injured as a direct and proximate result of said alleged defective con-

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dition thereof, you should find the defendant guilty."
298 That is a peremptory instruction, in that it could not be uncoupled by means of the pinlifter.

In the first place, there is no evidence that it could not be.

By the Court: There is evidence—the plaintiff's evidence; he said that he tried several times to do it when he was on the stirrup, and three times, before he uncoupled it, when he was on the ground.

By Mr. Slater: In the next place, it again ignores this question whether the slack was in or not. You are not supposed to be able to uncouple when the slack is out.

Br. Mr. Irwin: The case I am trying to find is a case where a train was going along, and the train parted because the coupler was defective. And that is where they have used that language in the first instruction, the efficiency with which it operates.

By the Court: Any other objection to E?

By Mr. Slater: No.

By the Court: I will give E.

By Mr. Slater: Then skipping on to the last one, P.

By the Court: You have no objection to any of the others?

By Mr. Slater: No, sir.

By Mr. Irwin: I, J, M and O, we will withdraw those.

299 By the Court: I am handing them back to you.

By Mr. Slater: I will give you mine, too, so I won't be confused.

By the Court: Then you have no objection to F, G, H, K, L and N.

By Mr. Slater: No.

(Plaintiff's proposed Instruction P is as follows:)

"If from the greater weight of the evidence in this case, under the instructions of the court, the jury finds the defendant guilty and that the plaintiff sustained injuries as a direct and proximate result of the accident in question, then you will be required to determine and assess the amount of the plaintiff's damages.

"In determining the amount of damages, if any, the plaintiff is entitled to recover in this case, the jury may take into consideration all the facts and circumstances pertaining to that subject proved by the evidence. You may consider what evidence, if any, there is of (1) the

nature and extent of plaintiff's physical injuries, if any, and the permanency of such inquries; (2) the physical disability of the plaintiff resulting from such injuries,
300 and such further physical disabilities and loss of health, if any, as are reasonably certain to result to the plaintiff from such alleged injuries; (3) the physical pain the plaintiff has suffered as a direct and proximate result of such alleged injuries, and such further pain and suffering, if any, as are reasonably certain to result to the plaintiff from such alleged injuries; (4) the loss of earnings sustained by the plaintiff as a direct result of such alleged injuries, and such future loss of earnings and inability to work as are reasonably certain to result from such alleged injuries; and the jury may find for the plaintiff such a sum, if any, as in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair and reasonable compensation for any such injuries and damages, if any, the plaintiff as a direct and proximate result of the accident in question has sustained or will sustain insofar, if at all, as such damages and injuries are alleged in the complaint and proven by the greater weight of the evidence."

By Mr. Slater: In P about the tenth line from the
301 botton, in "(4)"—this is a damage instruction—

"(4) the loss of earnings sustained by the plaintiff as a direct result of such alleged injuries, and such future loss of earnings and inability to work as are reasonably certain to result from such alleged injuries;".

There is no evidence that he can't work, or that there is any loss of earnings in the future.

By Mr. Irwin: If the testimony of this doctor could be believed, this doctor put a pad under his shoe to straighten his ankle so that it would function better. And that is a condition that has existed for a matter of two or three years.

By Mr. Slater: That is covered by (1), (2) and (3). But I am talking about permanent injuries.

By the Court: Permanent injuries, if he is lame.

By Mr. Slater: I am not objecting to (1), (2), and (3).

By the Court: I say that relates to his physical injuries. And now this comes down to the loss of earnings, if any, resulting from that physical injury.

By Mr. Slater: I am referring to the future loss of earnings. As I say, there has to be proof to support an instruction on that.

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By the Court: What kind of proof?

302 By Mr. Slater: That the doctor says that he can't carry on a job. There has to be medical proof to support it. The man himself does not even say he can't work. He has worked.

By Mr. Irwin: It is a question of fact for the jury whether they believe he will not be able to earn as much as he ever did.

By Mr. Slater: I say it must be supported by evidence.

By the Court: I think there is evidence showing that the man was injuried; that he can't walk without a limp, that there is an eversion of the foot. Now, the jury is as capable of knowing whether that limits his ability to work, as the doctor.

By Mr. Irwin: That brings up the question that arises, as to the impossibility of a man who is physicallly defective, getting a job. Insurance companies will not allow a man to be employed if he has a hand off or if he has a foot off. If he has any defect about him that increases the liability for injury. That is really a serious matter. There ought to be something done about it. Let this fellow go out and try to get a job.

By Mr. Slater: He got his job back again.

By the Court: It is so. There is no use arguing 303 about it. It is so.

By Mr. Slater: They are employing this kind of people today.

By the Court: You don't sit there and tell me that if a man has a hand off that he can get a job as easily as one with two hands, or that a man who walks with a limp can get a job as easily as a man without a limp.

By Mr. Slater: I would.

By the Court: You might prefer it, but I won't argue that. I have got more important things to argue than that.

By Mr. Slater: He is going to argue that to the jury.

By the Court: That is absurd.

Br. Mr. Slater: If he argues that to the jury, the point will come up.

By the Court: Well, it is true. Don't argue it. Don't be absurd. I know that if a man is hurt, that he is hurt and he can't get as good a job. I know that and I won't listen to it.

By Mr. Slater: I am only raising the point. Then does he have the right to argue that to the jury?

By the Court: Yes. I don't say whether he is injured, but if he is, there is some evidence, and he has a right to argue it to the jury.

What is your specific objection to P?

304 By Mr. Slater: That there is no evidence to support the instruction where it relates to loss of future earnings.

By the Court: Well, I think there is evidence that he broke this bone in his foot, and that it causes limitation of movement, and that it can cause him to limp. There is evidence that for a good part of his life he has worked as a laborer or other like work. I think the ordinary human being knows that a man that limps is handicapped in his work, if he is a laborer or does work of that sort.

By Mr. Irwin: Instead of walking on his foot flat, he kind of walks on the inside.

By the Court: So I think that there is evidence to support it.

Anything else?

By Mr. Slater: That is all.

By the Court: Now about this Instruction C.

(Plaintiff's proposed Instruction C is as follows:)

"A railroad company engaged in interstate commerce has the duty not only to provide couplers on cars coupling automatically by impact, but to keep them in such operative condition that they will always perform their func-

305 tions, and the test of compliance with the law is the operating efficiency of the couplers with which cars are equipped."

By Mr. Irwin: I am embarrassed because I had my memorandum on a paper that is on my desk.

By the Court: What is your objection to C?

By Mr. Slater: My objection is that it is inapt. In the first place, there isn't anything here having to do with the coupling of cars. The matter here is uncoupling.

In the second place, it says that the coupling device must always be in operative condition. The evidence shows that even though it is in proper working condition, when the slack is out it is not so constructed that the pin can be pulled.

By the Court: It is not its function to operate when the slack is out.

By Mr. Slater: But the instruction says that they must "keep them in such operative condition they will always perform their functions".

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I cannot see what coupling automatically has to do with it here. It is uncoupling. And I do not see why the word "impact" is put in. We are referring, not to impact, but to separation of cars.

By the Court: What is the statute? Is this a stat-
306 ute or the rule of the Commission requiring automatic couplers? What is the statute?

By Mr. Slater: Title 48 paragraph 2.

By the Court: What is your objection to Instruction C?

By Mr. Slater: My objection to it is that coupling is not involved; in this case it is a question of uncoupling; that the wording "coupling automatically by impact" has no bearing on the issues that are here involved; and in addition, that to say that they must always uncouple is too broad. It ignores the question of slack.

By the Court: What do you say about the proof of the fact, if it be a fact, that the plaintiff tried unsuccessfully five times to uncouple the car by means of a lever? What do you say about the sufficiency of that proof?

By Mr. Slater: I would say that proof had nothing to do with reference to this instruction that—

By the Court: No, just answer my question—showing a defect of the coupler.

By Mr. Slater: If the evidence showed that the slack was in at the time it would show a defect.

By the Court: Don't worry about the slack. Forget the slack. Just assume that the slack was in, and that the evidence showed that the plaintiff tried five times to
307 uncouple the car, would that show a defect in the coupler?

By Mr. Slater: Not in itself.

By the Court: What else?

By Mr. Slater: You would have to show what kind of force the man used himself.

By the Court: Assume that he used sufficient force.

By Mr. Slater: I would say if he tried, and the slack was in, there would be a defect.

By the Court: The slack was in and he tried with sufficient force to lift the handle, that would show a defect?

By Mr. Slater: Yes.

By Mr. Irwin: Of course, you have got the further evidence, that the conductor testified that the man didn't get the pin out at all, that he was the man who uncoupled the car after the accident.

By Mr. Slater: But you can't disregard Penn's testimony.

By Mr. Irwin: I am talking about what the evidence in the case is.

By Mr. Slater: I understood Penn to say that he uncoupled it.

By Mr. Irwin: He says he did. The conductor says that Penn never did get it uncoupled, that he uncoupled
308 it.

By the Court: I guess that is right.

By Mr. Slater: I still can't see what the proof has to do with what that says, "uncoupling automatically by impact".

By the Court: I think that "always" might very properly come out.

By Mr. Irwin: I think so, too; strike out the word "always".

By Mr. Slater: Judge, I am still on my third point—we don't know how this car coupled. I suppose it was coupled some minutes or hours before, in that yard. We don't know whether it "coupled automatically on impact" or not. That is not in dispute in this case.

By the Court: Just a minute:

"A railroad company engaged in interstate commerce has the duty not only to provide automatic couplers on cars but to keep them in such operative condition that they will perform their functions, and the test of compliance with the law is the operating efficiency of the couplers with which the cars are equipped."

By Mr. Slater: Why tell the jury about it? That is not involved.

309 By the Court: The duties involved. Did you hear what I said?

A railroad company engaged in interstate commerce has the duty not only to provide automatic couplers on cars, but to keep them in such operative condition that they will perform their functions, and the test of compliance with the law is the operating efficiency of the couplers with which cars are equipped.

By Mr. Slater: It is leaving out the words—

By the Court: Listen to what I read.

By Mr. Slater: Yes, I did. That is what your Honor omitted.

By Mr. Irwin: That is right.

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By the Court: A railroad company engaged in interstate commerce has the duty not only to provide automatic couplers on cars, but to keep them in such operative condition that they will perform their functions, and the test of compliance with the law is the operating efficiency of the couplers with which the cars are equipped.

Strike out "coupling automatically by impact" and the word "always".

Does that meet your objection?

310 By Mr. Slater: I think it does.

By the Court: I will give it as modified.

(Addressing Mr. Irwin.) Have you looked at his?

By Mr. Irwin: Yes, I have looked at his.

By the Court: Any objection?

By Mr. Irwin: No. 8 reads this way:

(Defendant's proposed Instruction 8 is as follows:)

"If you find from the evidence that at the time and place in question plaintiff did in fact uncouple said cars by means of said pin lifter, then you should find defendant not guilty as to the charge in plaintiff's complaint that defendant carelessly, negligently and unlawfully equipped and maintained on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act."

By Mr. Irwin: Of course, if that instruction would be given, that would be fatal to us.

By the Court: I can't give that. I will refuse it.

Any others?

By Mr. Irwin: Now 9 might be a misleading instruction. It simply says that if the plaintiff is guilty of

311 negligence and that it was the sole proximate cause of the accident then in such case the plaintiff is not entitled to recover.

Of course, if it is the sole proximate cause then the defective coupler could not have been the contributing factor, and the jury might have difficulty in following that. I think the instruction ought to be—was the sole proximate cause and that the defective coupler if any was not contributing. That instruction is given in practically all railroad cases, and jurors have stumbled on that instruction. They are not versed in legal verbiage, and they do not just grasp it. They don't give it the importance that it should receive.

By the Court: I think I will give it. You can talk to them about it.

By Mr. Irwin: Then, if I recall, the special interrogatory has been changed to meet the charges in the complaint.

By Mr. Slater: I have copied them exactly.

By Mr. Irwin: O. K.

By the Court: Here is a general form of verdict. Is that satisfactory?

By Mr. Irwin: Yes.

By Mr. Slater: All right.

Just one other question, and that is on the exhibits
312 going to the jury room. I think the plaintiff's statements should go in to the jury room.

You remember last time there was a hung jury. The jury wanted the statements. I have looked up the law, and it is discretionary with the Court.

By Mr. Irwin: Under the State law it is improper.

As far as the Federal Court is concerned, it is discretionary. I think if that goes in, I think I would ask to have the other impeaching statements go in. But the jury would spend their time browsing over a lot of immaterial matter. The salient points were read to the jury by you and by me.

By the Court: They can all go in, or all stay out. If any of you want them in, they will go in.

By Mr. Slater: I would like them in.

By the Court: In they go.

By Mr. Irwin: As to one of the statements I read, I don't know whether I had it marked.

By the Court: I think they were all offered and received.

(And thereupon the Court, Counsel for the respective parties and the Official Reporter return to open court, where the following further proceedings were had herein in the presence and hearing of the jury:)

313 And thereupon Mr. Irwin, at the close of all the evidence, addressed the jury in argument on behalf of the plaintiff.

314 And thereupon Mr. Slater addressed the jury in argument on behalf of the defendant.

315 And thereupon Mr. Irwin further addressed the jury in argument on behalf of the plaintiff.

316 And thereupon at the close of all the evidence, and after counsel for the respective parties had addressed the jury in argument, the Court charged the jury as follows:

317 By the Court: It is alleged in the plaintiff's complaint that on July 25, 1944, the plaintiff was employed

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by the defendant in the capacity of switchman and stood upon the stirrup of a certain car endeavoring to uncouple said car from the car next to it; that the coupler device was out of order and would not work, and that the plaintiff stepped down to the ground and had taken one or two steps in order to otherwise uncouple said cars, and that he thereupon stepped into an open space between the ties in the roadbed and thereupon the plaintiff's foot and ankle were broken and injured.

It is further alleged in said complaint that the defendant was then and there guilty of one or more of the following acts of negligence which directly caused injury to the plaintiff:

(a) The defendant unlawfully equipped and maintained on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliances Act.

It is further alleged that as a direct and proximate result of said negligence, the plaintiff was injured and damaged.

The defendant by its answer denied that the coupler
318 device referred to in the complaint was out of order and would not work. It denied that it unlawfully equipped or maintained on said car a defective coupler and denied that it in any way violated the provisions of the Federal Safety Appliance Act. It stated that the plaintiff was guilty of negligence in operating said coupler device and that the sole cause of said accident was plaintiff's own negligence and failure to exercise ordinary care for his own safety, and it denied that as a result of any negligence or misconduct on its part plaintiff suffered injuries or damages complained of by him.

If you believe from a preponderance of the evidence under the instructions of the Court that the plaintiff has proved his case as above set forth and as alleged in his complaint, then you should find the defendant guilty.

You are instructed that is is provided by the Federal Employers Liability Act that every common carrier by railroad, while engaging in commerce between any of the several States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier.

319 A railroad company engaged in interstate commerce has the duty not only to provide automatic couplers on cars, but to keep them in such operative condition that they will perform their functions, and the test of compliance with the law is the operating efficiency of the couplers with which cars are equipped.

You are instructed that in an action brought against a common carrier by railroad to recover damages for personal injuries to one of its employes, if it shall appear from the preponderance of the evidence that the violation if any by such carrier of any statute enacted for the safety of its employes as alleged in plaintiff's complaint proximately contributed to the injury of such employe, and if it shall further appear from the preponderance of the evidence that the employe at the time of receiving the injury, if any, was engaged by such common carrier by railroad in transportation between any of the several States, the employe shall not be held to have been guilty of contributory negligence nor to have assumed the risks of his employment.

If you believe from a preponderance of the evidence that the coupler on the car in question was defective in that the same could not be uncoupled by means of the pin lifter, and that the plaintiff at the time he was in-
320 jured was attempting to uncouple said coupler and was injured as a direct and proximate result of said alleged defective condition thereof, you should find the defendant guilty.

You are further instructed that in considering this case and arriving at your verdict, you should not take into account or be influenced by any statement, declaration or remarks of counsel, if any such have been made, unless the same are based upon or are justly and fairly deducible from the evidence.

In considering this case and in passing upon your verdict, you are not required to set aside your own observation and experience as men and women in the affairs of life, but on the other hand you have a right, upon consideration of all the evidence in the light of your own common observation and experience as men and women in the affairs of life, to say where the truth lies upon any material fact in the case.

The jurors are instructed that they, the jurors, are the sole judges of the questions of fact in this case, and they should determine the same from the evidence in the case.

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The law of the case as contained in the instructions given by the Court to the jury should be applied by the jury to the facts of the case as the jury shall find such facts from the evidence, but the Court does not mean by any in-
321 struction given the jury to tell them at what conclusion they shall arrive as to any fact in the case, the finding of the facts being exclusively within the province of the jury. The jury should not be influenced in the slightest degree as to the facts in the case by any assertion or statement of counsel on either side of the case unless the same is sustained by evidence in the case.

The Court instructs the jurors that while they are the judges of the credibility of the witnesses, they have no right to arbitrarily disregard the testimony of the plaintiff, if they believe from the evidence it is credible, simply because he is interested in the result of the suit, but it is the duty of the jury to receive and weigh the testimony of such witness having in mind that fact, in the light of all the facts and circumstances, the same as they would receive and weigh the testimony of any other witness.

The degree of proof required of the plaintiff is that he prove his case by a preponderance of the evidence. This means that upon the question of fact which the plaintiff is required to prove he must have a greater weight or preponderance of evidence. But this rule does not re-
322 quire the plaintiff to prove any fact beyond a reasonable doubt; a fact is sufficiently proved if the jury find that the greater weight of the evidence is in his favor.

The weight of the testimony does not necessarily depend on the greater number of witnesses sworn on either side of a question in dispute, but in determining upon which side the preponderance of evidence is, the jury may take into consideration the number of witnesses testifying upon one side or the other of a disputed point; the opportunities of the several witnesses for seeing or knowing the things to which they testified; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability of the truth of their several statements; and for all these circumstances, together with all the other facts and circumstances appearing from the evidence upon the trial, determine upon which side of such question in dispute is the greater weight or a preponderance of the evidence; and if you believe from the evidence, under the instructions of the Court, after

considering all the facts and circumstances appearing in evidence and the number of witnesses testifying on the respective sides of this case, that the evidence of the lesser number of witnesses on the one side of such question or
323 questions in dispute is more credible and trustworthy and outweighs the evidence of the greater number of witnesses on the other side thereof, then as to said question or questions the evidence preponderates on the side of the lesser number of witnesses.

If from the greater weight of the evidence in this case, under the instructions of the Court, the jury finds the defendant guilty and that the plaintiff sustained injuries as a direct and proximate result of the accident in question, then you will be required to determine and assess the amount of the plaintiff's damages.

In determining the amount of damages, if any, the plaintiff is entitled to recover in this case, the jury may take into consideration all the facts and circumstances pertaining to that subject proved by the evidence. You may consider what evidence, if any, there is of (1) the nature and extent of plaintiff's physical injuries, if any, and the permanency of such injuries; (2) the physical disability of the plaintiff resulting from such injuries, and such further physical disabilities and loss of health, if any, as are reasonably certain to result to the plaintiff from such alleged injuries; (3) the physical pain the plaintiff has suffered as a direct and proximate result of such alleged injuries, and such further pain and suffering,
324 if any, as are reasonably certain to result to the plaintiff from such alleged injuries; (4) the loss of earnings sustained by the plaintiff as a direct result of such alleged injuries, and such future loss of earnings and inability to work as are reasonably certain to result from such alleged injuries; and the jury may find for the plaintiff such a sum, if any, as in the judgment of the jury, under the evidence and instructions of the Court in this case, will be a fair and reasonable compensation for any such injuries and damages, if any, the plaintiff as a direct and proximate result of the accident in question has sustained or will sustain insofar, if at all, as such damages and injuries are alleged in the complaint and proven by the greater weight of the evidence.

Preliminary to your being accepted and sworn to act as jurors in this case, you were examined by both plain-

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tiff and defendant as to your competency and qualifications to act as jurors in this case. As a part of such examination each of you answered all questions asked you by both plaintiff and defendant. Your answers showed you were competent and qualified to act as jurors and the parties to this suit accepted you as jurors on the faith of your answers. The answers you then made to such ques-
325 tions in regard to your competency, qualification, fairness, lack of prejudice and freedom from passion and sympathy are as binding on you now as they were then, and should so remain until you are finally discharged from further consideration of the case. It would be improper for you to disregard those answers that rendered you competent jurors.

It is your duty to consider this case the same as you would consider a case between two private citizens. The fact the defendant is a railroad corporation should not influence you in any degree whatever. A corporation is entitled to the same consideration from the jury as is given to private citizens in like circumstances. You should not be influenced, one way or the other, by sympathy for the plaintiff or prejudice against the defendant. The plaintiff and defendant stand in law precisely the same as though each of them was a man or woman, and it is your duty to hear and consider the evidence and these instructions with the same fairness and impartiality, and to arrive at the same verdict, as if this lawsuit were between individual men and women.

The Court instructs the jury as a matter of law while plaintiff is entitled to testify as a witness on his own be-
half, you have a right in this case in passing upon the
326 weight and credibility of plaintiff's testimony to take into consideration that he is a party of the lawsuit and is interested in the outcome of the case.

The jury are instructed that they are not required to believe a thing to be a fact simply because some witness has sworn it to be a fact, if the jury believe from the evidence and conduct of such witness, as such witness appears to the jury, or from the contradictory or improbable character of the story of such witness, if it appears to you to be contradictory or improbable, that upon a full and intelligent weighing of the testimony it is unworthy of belief.

The Court instructs the jury that while they are the judges of the credibility of the witnesses, they have no

right to disregard the testimony of an unimpeached witness sworn on behalf of defendant simply because such witness was or is an employe of the defendant. It is the duty of the jury to receive the testimony of such witness in the light of all the evidence, the same as they would receive the testimony of any other witness and to determine the credibility of such employe by the same principles and tests by which they would determine the credibility of any other witness.

327 You are instructed that the provisions of the section of the Federal Safety Appliance Act upon which this suit is brought are as follows:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The Court instructs the jury that before plaintiff can recover he is required to prove by a preponderance of the evidence that the coupler on said car was defective in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act. If the plaintiff in this suit has not so proved his case or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance of the evidence, or if the preponderance of the evidence is in favor of the defendant, then in either of these cases the verdict should be not guilty.

The Court instructs the jury that before plaintiff can recover in this case he must prove by a preponderance
328 or greater weight of the evidence not only that said coupler was defective as alleged in plaintiff's complaint, but also that such condition, if any, was a proximate cause of plaintiff's injuries.

The term "proximate cause" as used in these instructions means a cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced or contributed in producing the result complained of.

If you believe from the evidence in this case that at and immediately prior to the beginning of the happening of the accident and injuries in question to the plaintiff, the plaintiff himself was guilty of negligence or carelessness and that such negligence or carelessness on his part, if any, was the sole proximate cause of said accident and in-

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juries, then and in such a case, the plaintiff is not entitled to recover and your verdict should be not guilty.

You are instructed that the fact that the Court has given any instructions on the subject of damages or that defendant's counsel may have discussed such subject, is not to be taken by you as any intimation by the Court or as any admission by the defendant of the defendant's liability for the injuries complained of.

Before considering the question of damages you
329 must first determine the question of defendant's liability and if you find from the evidence in this case under the instructions that the plaintiff is not entitled to recover, then you will have no occasion to consider at all the question of damages.

In this case it is claimed that the plaintiff sustained physical injuries as a result of the occurrence in question, and has in consequence thereof suffered disabilities complained of. The burden is upon the plaintiff as to each and every one of the claimed injuries or disabilities to prove by a preponderance or greater weight of the evidence in this case, not only that such alleged injuries or disabilities really exist or have existed, but that such alleged injuries or disability are the result of the accident in question; and unless plaintiff has proved by a preponderance or greater weight of the evidence in this case as to each one of such claimed injuries and disabilities that it really exists or has existed, and also that it resulted from the accident in question, then he cannot recover for such alleged injury or disability.

You have no right to guess or conjecture that any ailment or disability complained of is the result of the occurrence complained of.

You are instructed that unless there has been shown
330 by a preponderance of proof leading reasonably to the conclusion that plaintiff's injuries are certain to be permanent, you must not assess damages for plaintiff's injuries, as or for permanent injuries.

Sympathy for the injuries and disabilities of the plaintiff, from whatever source they may come, should have no influence upon you in determining whether or not the defendant is liable, or, if liable, control in any way your verdict. Both the question of liability and damages are matters to be determined from the evidence and under the instructions of the Court; prejudice, sympathy or any outside matters should not affect your judgment; in other

words, it is your duty to give every question in the case a calm, careful and conscientious consideration, uninfluenced by sympathy, or any consideration other than the evidence and the law as given to you in these instructions.

When you go to your jury room you will take with you the exhibits which have been offered and received in evidence, and also three forms of verdict, the first of which reads as follows:

"We, the jury, find the defendant not guilty." If you find the defendant not guilty, the twelve of you will sign this form which I have just read, and return it with you into court.

331 The next form which you will take with you reads:

"We, the jury, find the defendant guilty and assess the plaintiff's damages at the sum of ..... dollars and ..... cents ($.....)."

If you find the defendant guilty you will fill in the blanks, indicating the amount at which you assess the plaintiff's damages; and the twelve of you will sign the form and return it with you into court.

The third form which you will take with you reads as follows:

"Special interrogatory:

"Did the defendant unlawfully equip and maintain on such car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act:

Answer: ....."

Fill in that blank indicating your answer to that interrogatory.

Having done that the twelve of you will sign the form and return it with you into court.

I suggest that when you retire to your jury room you first choose one of your number as foreman to pre-

332 side over your deliberations.

Will you swear the Marshals, Mr. Clerk?

(Thereupon the oath was duly administered to the Marshals.)

By the Court: You may retire with the Marshals, Ladies and Gentlemen, and consider of your verdict.

Counsel will assemble the exhibits and hand them to the Marshal.

(Thereupon the jury retire to consider their verdict.)

By Mr. Slater: We just have a little dispute about one exhibit, that is the list of earnings.

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By the Court: Yes.

By Mr. Slater: I think it ought not to go in.

By Mr. Irwin: That is prepared by you, this computation.

By Mr. Slater: There is no dispute about it. It was accepted without protest. All the exhibits are to go in, as I understand it—all that were received.

By the Court: That is a compilation.

By Mr. Slater: I think the jury is going to be interested in this, because Mr. Irwin contended I misled them, that he was making four or five hundred dollars.

By the Court: Was it offered and received in evidence?

333 By Mr. Slater: Yes.

By the Court: Well, it may go to the jury.

What are your wishes about a sealed verdict? I will be here until four o'clock or maybe a little later. If this jury does not arrive at a verdict by that time, what are your wishes?

By Mr. Irwin: Signed and sealed, and separate.

By the Court: How long do you want them kept?

By Mr. Slater: I think ten o'clock ought to be long enough.

By Mr. Irwin: I don't want to try the case over. We have tried it once.

By the Court: They were out all night that time. I sent them out a little later.

By Mr. Irwin: Say twelve o'clock.

By the Court: Let me see the list of jurors.

(Cards handed to the Court.)

By the Court: I will make this order then:

"By agreement of the parties by their counsel in open court it is ordered:

"That, if the jury in this case arrive at a verdict after the hour of 4:30 o'clock p. m. of this the 10th day of October, 1946, and before the hour of 10:00 o'clock a. m. of the 11th day of October, 1946, they shall sign and seal their
334 verdict, deliver it to one of the Marshals in charge of the jury and separate; that the jury need not reassemble; that the verdict may be read in the absence of the jury; that the polling of the jury is waived; and that the Court may reassemble the jury for the purpose of correcting any clerical errors in the verdict."

I will make this order at four-thirty when I leave.

(Which were all the proceedings had in the above-enti-

tled cause at the time and place aforesaid; no further proceedings being had therein until during the afternoon session of the same day, October 10, 1946, at which time the following:—)

By the Court: Are both sides here?

By Mr. Irwin: Yes.

By Mr. Slater: Yes.

By the Court: Bring in the jury.

(And thereupon the jury took their places in the jury box.)

By the Court: Have you arrived at a verdict, Ladies and Gentlemen?

335 By Jurors: Yes, your Honor.

By the Court: Hand the verdict to the Marshal.

(Verdict handed to the Marshal, and by him to the Clerk.)

By the Court: You may read the verdict, Mr. Clerk.

By the Clerk. (Reading.)

"Alfred S. Penn against Chicago and North Western Railroad Company No. 45 C 1148.

"We the jury find the defendant guilty and assess the plaintiff's damages at the sum of Fifteen Thousand Dollars."

"Special interrogatory.

"Did the defendant unlawfully equip or maintain on such car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act:

Answer: Yes."

Both verdicts signed by the foreman and twelve other jurors.

By the Court: Any motions, Gentlemen?

(There was no response.)

By the Court: Enter the verdict, Mr. Clerk.

Let there be judgment on the verdict.

336 I thank you for your attention to this case, Ladies and Gentlemen. You may now be excused until tomorrow morning, at which time you will return to Room 702.

Which was all of the evidence offered and received, and all of the proceedings had upon the trial of the above-entitled cause (save and except the opening statements by counsel for the respective parties, and the closing arguments by counsel for the respective parties).

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337 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—45-C-1148) * *

AFFIDAVIT OF ASSISTANT REPORTER.

State of Illinois } ss.
County of Cook }

Earl W. Radford, being first duly sworn, on oath states that he is a court reporter doing business in the City of Chicago, Illinois; that he has been so engaged for more than fifteen years last past; that under authority of a resolution of the Judicial Conference of Senior Circuit Judges, adopted at its September Session, 1944, and with the approval of the Hon. John P. Barnes, Senior Judge of the District Court of the United States for the Northern District of Illinois, affiant was employed by Roy E. Fuller, Official Reporter of said Court, as his assistant re-
338 porter; that as such assistant reporter, affiant attended the hearings of the above-entitled cause before the Hon. John P. Barnes, Judge of said Court, and a jury, on the 7, 8 and 9th days of October, 1946, and recorded in shorthhand the proceedings then and there had in said cause; affiant further says that the foregoing transcript, consisting of 271 pages, numbered consecutively from 1 to 271, inclusive, is a full, true and accurate transcript of affiant's said shorthand notes, so taken as aforesaid. Further affiant saith not.

Earl W. Radford.

Subscribed and sworn to before me this 21st day of October, 1946.

Joseph S. Guyette,
(Seal) *Notary Public, Cook County, Illinois.*

My Commission expires May 31, 1947.

339 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—45-C-1148) * *

CERTIFICATE.

I hereby certify that the above and foregoing is a full, true and accurate transcript of the original shorthand notes of said proceedings, taken upon the trial of the above-entitled cause (save and except opening statements by counsel for the respective parties, and closing arguments by counsel for the respective parties).

Roy E. Fuller,
Official Court Reporter, United States District Court, Northern District of Illinois.

October 21, 1946.

343 PLAINTIFF'S EXHIBIT NO. 1.

R. R. C&NW Div. Supt Frt Terml

Report of Personal Injuries to Employes, Passengers or Other Persons

Instructions:—This report must be made and sent to the Division Superintendent or Master Mechanic Immediately After The Infliction Of An Injury To Any Person Or Damage To Property Whatsoever. Separate reports must be made for each person injured whether the injury is severe or slight. Every question must be answered fully. If blank spaces are insufficient for full statements, answer further in form of letter and attach hereto. If The Injured Person Is An Employee He Should Also Make A Statement Of Facts In Relation To The Accident On This Form. No excuse will be accepted for not giving full answers to all questions bearing on the accident which is being reported. If any of the information called for is not within your knowledge, but can be obtained, you must obtain it at once and include it in report. Cars, engines or equipment connected with injury must be carefully examined immediately,

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and condition of same shown in report, and Rule 806 complied with.

(If joint facility, A.F.E. or A.F.M. is involved, Division Officials forwarding this report will so advise.)

1. Name of injured person A S Penn Employee? Brakeman Age 47
2. Address of injured person. City Maywood Ill Street 49 Lake St.
3. Occupation of injured person Brakeman Married? Yes
4. If passenger, from where ..... to where .....
5. Was passenger riding on ticket, pass or contract? .....
6. Place of accident Track 35 Switch WE Yard 8 Proviso Date July 25, 1944 Hour 12 Noon
7. Weather: Daylight Yes Dark ..... Clear Yes Cloudy ..... Foggy ..... Raining ..... Snowing ..... Sleeting .....
8. Describe fully how accident occurred: He was pulling pins, and was running along with the cut and was trying to pull pin a car which he did and just as he pulled the pin, he made a mis-step like he was stepping in a hole and walked away limping.
9. Describe injuries: Left ankle Injured
10. Name of doctor Dr. Hills Address Elmhurst Ill
11. Who called doctor? Taken to Dr. Hills by V Obrock Important
12. Name and address of every person who witnessed accident or can give any information regarding it, or was first to arrive after accident.

    Name City Street

    H Fairchild Engineer
13. Did you witness accident? Yes Where were you at the time? I was at 39 Switch
14. If injured is an employe, how long in service? 8 Months Name of Supervising Officer J. F. Charters
15. If employe, has he resumed work? No If so, when? ..... Working hours per day 8 Days worked per week 7 Per Month 30 Wages or average earnings per day $8.54 Wages or average earnings per week .....
16. What does injured person say was cause of accident? He said he stepped on switch rod Who, if anyone, is to blame for it? .....

17. If cars involved give:

Number	Initial	Loaded or Empty	Shipping Point	Destination
None				

18. Did you make inspection? (See Rule 806) .....
19. If bad order condition, or carelessness involved, describe fully. Give car or engine number. (If not bad order, so state) .....
20. Engine No. 1851 Train No. Switch Kind of train Freight No. of cars in train 5 cars Speed About 3 M.P.H Backing up? ..... Standing still? ..... Direction of train? .....
21. Conductor A Wescott Baggageman ..... Brakeman or switchman V Piercey Brakeman or switchman A S Penn Engineer H Fairchild Fireman ..... Yardmaster R P Klasen Foreman .....
22. If highway crossing accident give name or number of highway ..... Nearest station ..... Direction and distance from same ..... Gates there? ..... Were they down? ..... Flagman? ..... Was he on duty? ..... Wigwags or flashers? ..... Were they working? ..... Crossing bell? ..... Ringing? ..... Was locomotive whistle sounded? ..... Where started? ..... Was locomotive bell ringing? ..... Where started? ..... Was headlight burning? ..... Was view obstructed? .....

The above is a correct statement.

(Sign here) A. L. Wescott
Occupation Conductor Dept. Operating
Address 175 Berteau Ave. Elmhurst Ill
Date 7-25-44

Witnesses To Signature
Witness: Edward C. Kett
Address: 67 No. Elizabeth St. Lombard Ill.
Witness: Dorothy Spindler
Address: 300 Englewood Ave. Bellwood Ill.

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344 PLAINTIFF'S EXHIBIT NO. 2.

R. R. C&NW Div. Chgo Frt Terml.

Report Of Personal Injuries To Employes, Passengers Or Other Persons.

Instructions:—This report must be made and sent to the Division Superintendent or Master Mechanic Immediately After The Instruction Of An Injury To Any Person Or Damage To Property Whatsoever. Separate reports must be made for each person injured whether the injury is severe or slight. Every question must be answered fully. If blank spaces are insufficient for full statements, answer further in form of letter and attach hereto. If The Injured Person Is an Employe He Should Also Make A Statement Of Facts In Relation To The Accident On This Form. No excuse will be accepted for not giving full answers to all questions bearing on the accident which is being reported. If any of the information called for is not within your knowledge, but can be obtained, you must obtain it at once and include it in report. Cars, engines or equipment connected with injury must be carefully examined immediately, and condition of same shown in report, and Rule 806 complied with.

(If joint facility, A. F. E. or A. F. M. is involved, Division Officials forwarding this report will so advise.)

1. Name of injured person A S Penn. Employe? Yes. Age 47.
2. Address of injured person. City Maywood, Ill. Street 49 Lake St.
3. Occupation of injured person Brakeman. Married? Yes.
4. If passenger, from where ..... to where ..... .
5. Was passenger riding on ticket, pass or contract? .....
6. Place of accident Track 35 Switch WE Yard B Proviso. Date July 25, 1944. Hour About 12 Noon.
7. Weather: Daylight Yes. Dark ..... Clear Yes. Cloudy ..... Foggy ..... Raining ..... Snowing ..... Sleeting .....

8. Describe fully how accident occurred: All I know about this accident is that when I looked up, he was hobbling away from the cut of cars on the Yard 8 lead over to a bench located under Wolf Road Bridge. I went up and asked him what was the matter and he said I think I sprained my ankle. Then I asked him how he did it and he said he was pulling a pin or a car, running alongside of it and caught his foot between two switch ties at No. 35 switch.
9. Describe injuries: Left Foot injured.
10. Name of doctor Dr. Hills. Address Elmhurst, Ill.
11. Who called doctor? Taken to Doctor by V. Obrock.

Important.

12. Name and address of every person who witnessed accident or can give any information regarding it, or was first to arrive after accident.

Name	City	Street

13. Did you witness accident? No. Where were you at the time? I was on Yard 8 lead at about 39 switch.
14. If injured is an employe, how long in service? 8 months. Name of Supervising Officer J. F. Charters.
15. If employe, has he resumed work? No. If so, when? .....
    Working hours per day 8. Days worked per week 7. Per month 30.
    Wages or average earnings per day $8.54. Wages or average earnings per week .....
16. What does injured person say was cause of accident? He said he stepped in between the two ties and when he pulled his foot out it was stuck.
    Who, if anyone, is to blame for it? .....
17. If cars involved give:

Number	Initial	Loaded or Empty	Shipping Point	Destination

18. Did you make inspection? (See Rule 806) .....

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19. If bad order condition, or carelessness involved, describe fully. Give car or engine number.
(If not bad order, so state) .....
.....
.....

20. Engine No. 1851. Train No. Switch. Kind of train Freight. No of cars in train 8 cars. Speed 5 MPH. Backing up? ..... Standing still? ..... Direction of train? .....

21. Conductor A. Wescott. Baggageman .....
Brakeman or switchman V. Piercey. Brakeman or switchman A. S. Penn. Engineer H. Fairchild. Fireman ..... Yardmaster R. P. Klasen.
Foreman .....

22. If highway crossing accident give name or number of highway ..... Nearest station.....
Direction and distance from same .....
Gates there? ..... Were they down? ..... Flagman? ..... Was he on duty? ..... Wigwag or flashers? .....
Were they working? ..... Crossing bell? ..... Ringing? ..... Was locomotive whistle sounded? ..... Where started? ..... Was locomotive bell ringing? ..... Where started? ..... Was headlight burning? ..... Was view obstructed? .....

Witnesses to Signature:
Witness: Edward C. Klett.
Address: 67 No. Elizabeth St., Lombard, Ill.
Witness: Dorothy Spindler.
Address: 300 Englewood Ave., Bellwood, Ill.

The above is a correct statement.
(Sign here) R. P. Klasen.
Occupation Yardmaster. Dept. Operating.
Address 701 So. 2nd Ave., Maywood, Ill.

Date July 25, 1944.

345 PLAINTIFF'S EXHIBIT NO. 3.

Elmhurst, Illinois,
December 28th, 1945.

Mr. Henry R. Fairchild, engineer, says in relation to the accident to Alfred Penn at Proviso, Illinois, on July 25th, 1944, as follows:

I am 50 years of age, married, and live at 315 Lawndale Avenue, Elmhurst, Illinois. I am employed by the C&NW Railway Company as a locomotive engineer and have been with the Company for about 28 years.

On the date of the above accident I was running the engine in this switch job. I was looking back and watching for signals. I saw the accident to Mr. Penn. We were moving about 5 miles an hour at the time he was injured. I had received a kick sign and was kicking the cars and Penn ran up to cut off this car. I do not recall what type of car it was. The slack had run out of the car and that made the pin harder to pull. An older man would have waited until they stopped and then pulled the pin on another move.

I did not see Penn get on the car at any time. All the time he was running along side of the cars and did not get on them at any time. He was having trouble pulling the pin, because of the slack being out and he seemed to jump into the air to get the pin and then stepped on this switch. I would say that we were switching at the usual speed for this type of work.

When I saw Penn pulling this pin I was on the engine looking back and was about 10 cars from him. At the time of the accident it was daylight, warm, clear, and the ground was dry.

I do not know which track this car was put in on. It may have been track #37 or #39.

I have read the above and it is true.

Henry A. Fairchild.

Witnesseth:
Edward Warden.

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346 DEFENDANT'S EXHIBIT NO. 3.

R. R. C&NW Div. Chgo Frt Terml.

Report Of Personal Injuries To Employes, Passengers Or Other Persons.

Instructions:—This report must be made and sent to the Division Superintendent or Master Mechanic Immediately After The Instruction Of An Injury To Any Person Or Damage To Property Whatsoever. Separate reports must be made for each person injured whether the injury is severe or slight. Every question must be answered fully. If blank spaces are insufficient for full statements, answer further in form of letter and attach hereto. If The Injured Person Is an Employe He Should Also Make A Statement Of Facts In Relation To The Accident On This Form. No excuse will be accepted for not giving full answers to all questions bearing on the accident which is being reported. If any of the information called for is not within your knowledge, but can be obtained, you must obtain it at once and include it in report. Cars, engines or equipment connected with injury must be carefully examined immediately, and condition of same shown in report, and Rule 806 complied with.

(If joint facility, A. F. E. or A. F. M. is involved, Division Officials forwarding this report will so advise.)

1. Name of injured person A. S. Penn. Employe? Brakeman. Age 47.
2. Address of injured person. City Maywood, Ill. Street 49 Lake St.
3. Occupation of injured person Brakeman. Married? Yes.
4. If passenger, from where ..... to where .....
5. Was passenger riding on ticket, pass or contract? .....
6. Place of accident Yard 8 lead 35 switch Proviso. Date July 25, 1944. Hour 12 Noon.
7. Weather: Daylight Yes. Dark ..... Clear Yes. Cloudy ..... Foggy ..... Raining ..... Snowing ..... Sleeting .....

8. Describe fully how accident occurred: I was pulling pins and Condr. Give a cut sign and train was going a little fast and I got off to pull a pin and I stepped in Track 35 switch and caught my heel in between switch rod and tie and turned my left ankle.
9. Describe injuries: Left Ankle injured.
10. Name of doctor Dr. Hills. Address Elmhurst, Ill.
11. Who called doctor? Taken to Doctor by V. Obrock.

Important.

12. Name and address of every person who witnessed accident or can give any information regarding it, or was first to arrive after accident.

Name	City	Street
R. P. Klasen YM	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

13. Did you witness accident? ..... Where were you at the time? Pulling pins on lead.
14. If injured is an employe, how long in service? 8 months. Name of Supervising Officer J. R. Cantwell, ASFT.
15. If employe, has resumed work? ..... If so, when? ..... Working hours per day 8. Days worked per week 7. Per month 30. Wages or average earnings per day $8.64. Wages or average earnings per week .....
16. What does injured person say was cause of accident? Stepped in between switch rod and tie while pulling pins. Who, if anyone, is to blame for it? .....
17. If cars involved give:

Number	Initial	Loaded or Empty	Shipping Point	Destination
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

18. Did you make inspection? (See Rule 806) .....
19. If bad order condition, or carelessness involved, describe fully. Give car or engine number. (If not bad order, so state) .....
.....
.....

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20. Engine No. ..... Train No. Switch. Kind of train Freight. No of cars in train 8. Speed 10 MPH Backing up? ..... Standing still? ..... Direction of train? .....

21. Conductor A. Wescott. Baggageman ..... Brakeman or switchman ..... Brakeman or switchman ..... Eingineer ..... Engineer ..... Fireman ..... Yardmaster R. P. Klasen. Foreman .....

22. If highway crossing accident give name or number of highway ..... Nearest station ..... Direction and distance from same ..... Gates there? ..... Were they down? ..... Flagman? ..... Was he on duty? ..... Wigwags or flashers? ..... Were they working? ..... Crossing bell? ..... Ringing? ..... Was locomotive whistle sounded? ..... Where started? ..... Was locomotive bell ringing? ..... Where started? .... Was headlight burning? ..... Was view obstructed? .....

Witnesses to Signature:
Witness: Edward C. Kett.
Address: 67 No. Elizabeth St., Lombard, Ill.
Witness: Dorothy Spindler.
Address: 300 Englewood Ave., Bellwood, Ill.

The above is a correct statement.
(Sign here) A. S. Penn.
Occupation Brakeman. Dept. Operating.
Address 49 Lake St., Maywood, Ill.

Date July 25, 1944.

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Defendant's Exhibit No. 7.

185

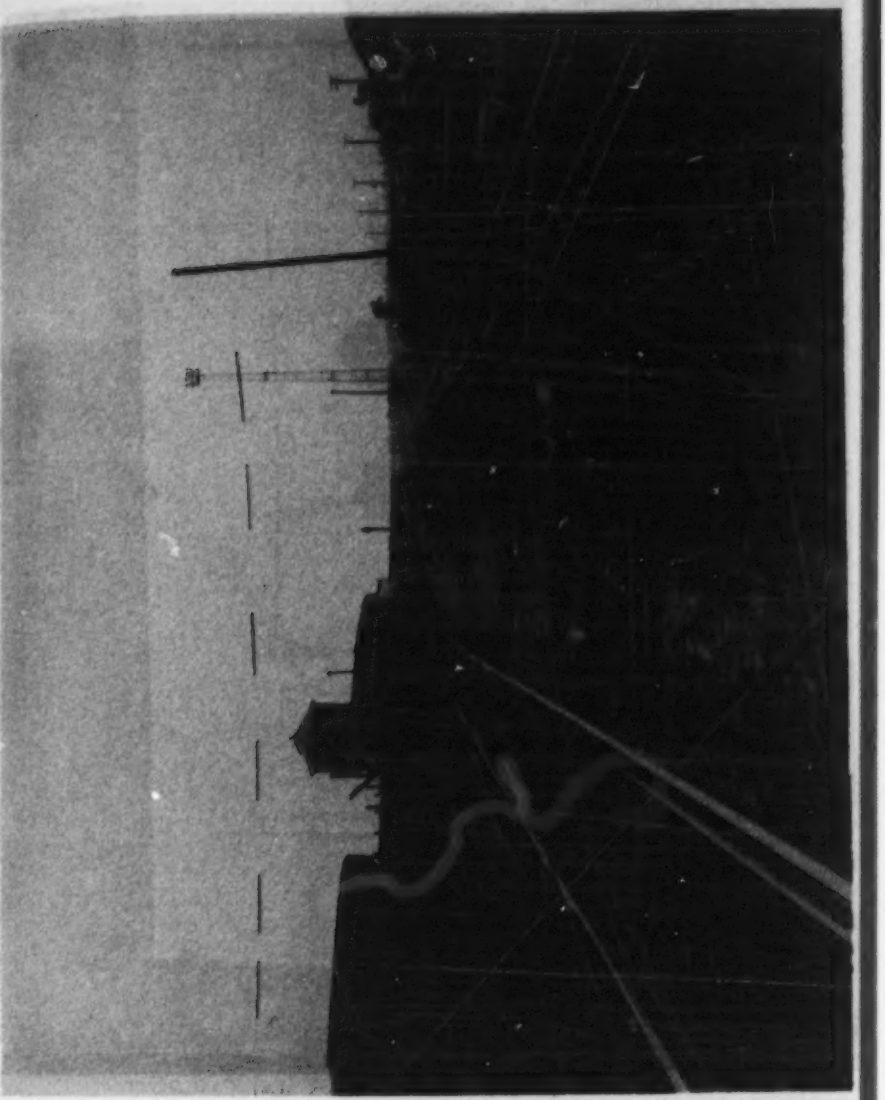
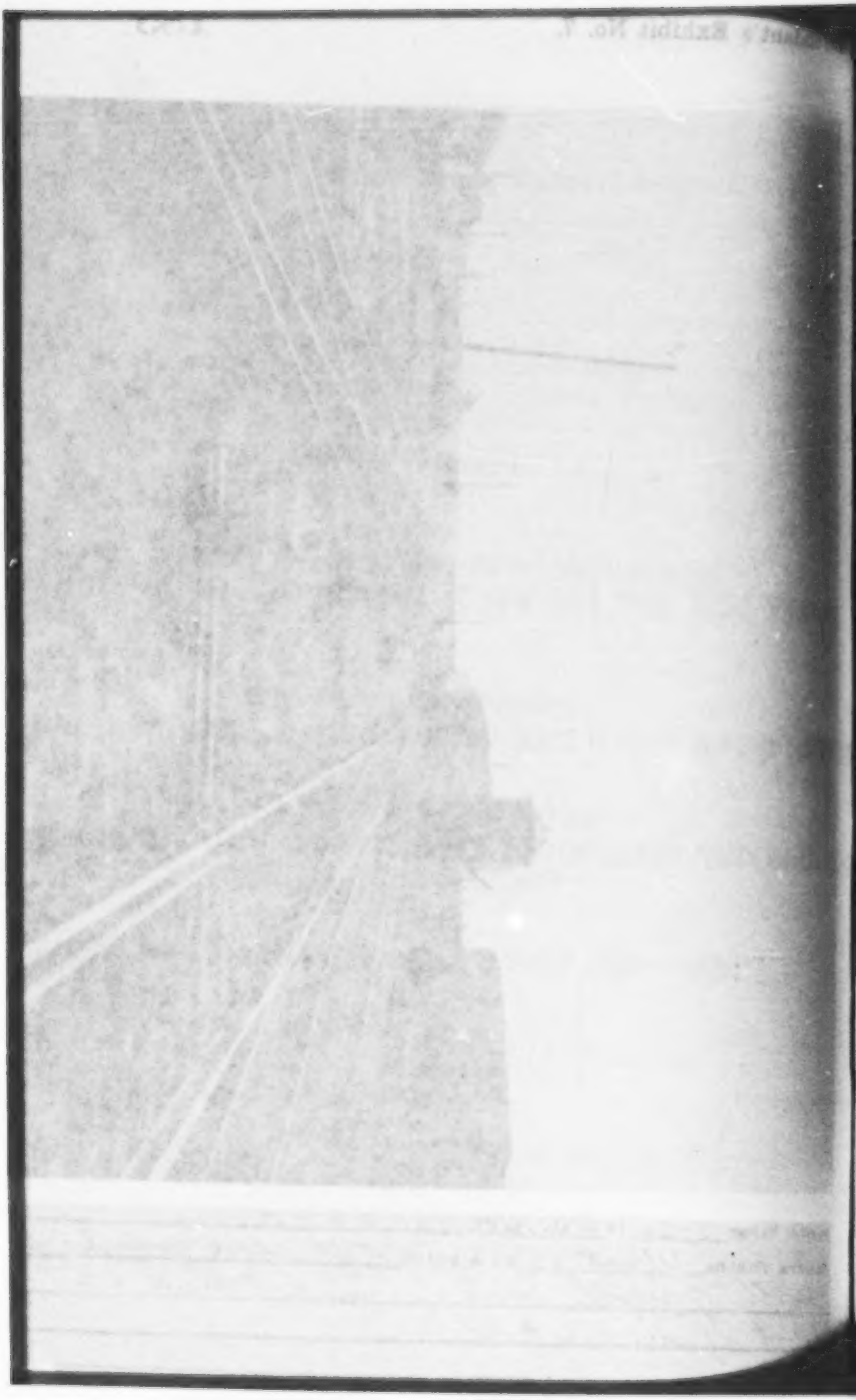


Photo Taken 7-25 19[illegible] [illegible] yard [illegible]

Camera Facing West At a point 5 ft. above ground - 3 ft. North & north end of yard 8 lead + 25 ft. East of switch #35

COPY BOUND VERTICALLY



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COPY BOUND CLOSE IN CENTER

Defendant's Exhibit No. 8. 186

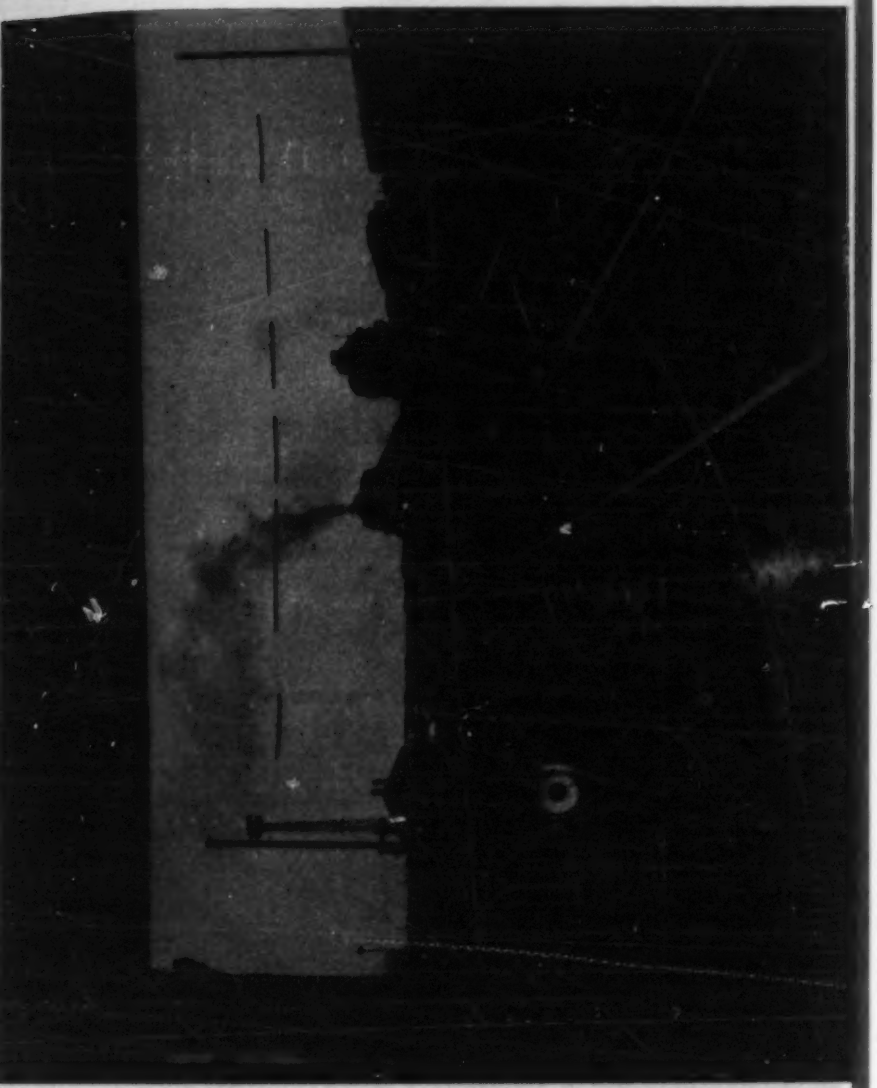

Photo taken 7-25 1944 [illegible] Yard 8 - Pomeroy

Camera facing East at a point 5 ft. above ground - 25 ft. West of switch #38 - + 3 ft. north of north rail of yard 8 lead

COPY BOUND VERTICALLY

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Defendant's Exhibit No. 9.

187

Special Interrogatory

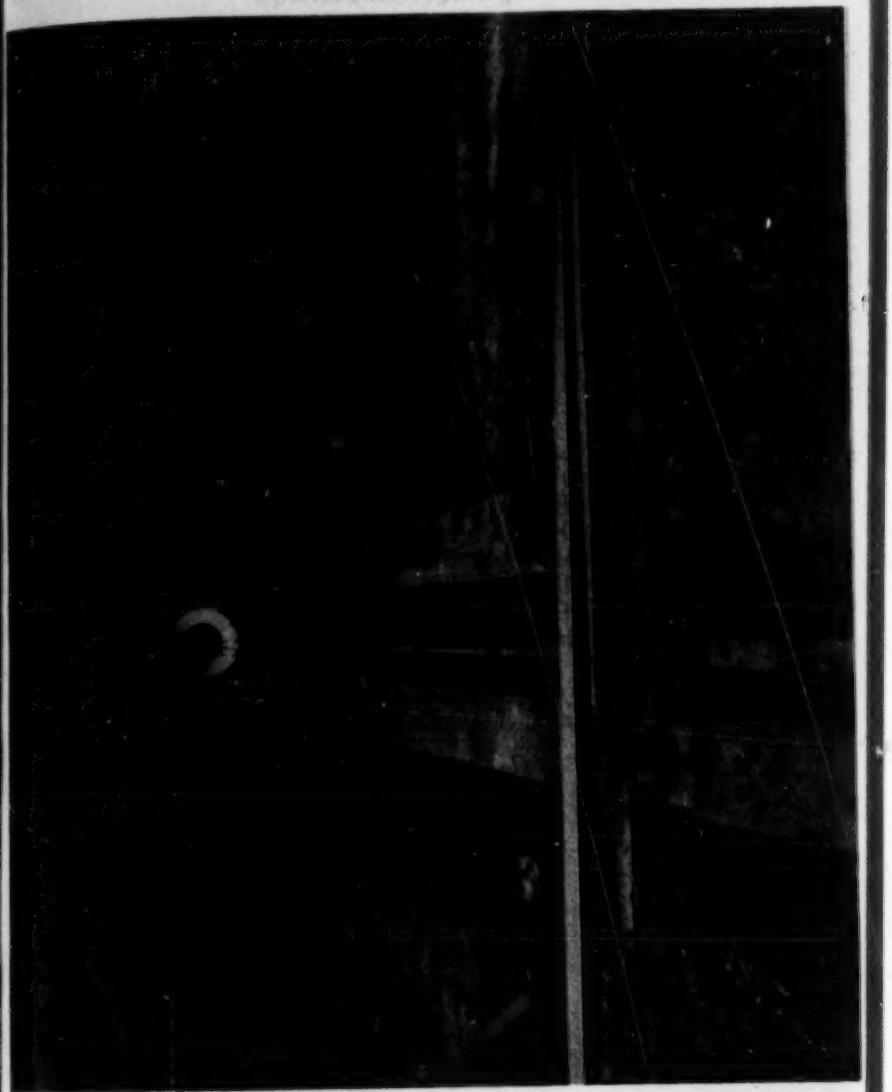

Photo Taken 7-25 1944 at 8:40 PM Yard C - Provo

Camera Facing North At a point 5' ft. above tier & between

rails of track #34 - 15 ft. south of switch #35

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350 And on the same day to wit, the 10th day of October, 1946 there was filed in the Clerk's office of said Court certain Special Interrogatory in words and figures following, to wit:

351 **Special Interrogatory.**

Did the defendant unlawfully equip or maintain on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act?

Answer: Yes.

Michael J. McGregory,
(Foreman.)

Margaret A. Bloom,
Helen F. Murphy,
Duncan J. Hall,
Francis P. Campbell,
George J. Ader,
Wilmer H. Brands,
Elinore S. Klein,
Lucile D. Miller,
Florence K. Cook,
Beatrice M. Goodwin,
Clara L. McAndrews.

352 And on the same day to wit, the 10th day of October, 1946 there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to wit:

353 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—45-C-1148) * *

VERDICT.

We, the Jury, find the defendant guilty and assess the plaintiff's damages at the sum of Fifteen Thousand Dollars and no cents. $15,000.00.

Michael J. McGregory,
(Foreman.)
Margaret A. Bloom,
Helen F. Murphy,
Duncan J. Hall,
Francis P. Campbell,
George J. Ader,
Wilmer H. Brands,
Elinore S. Klein,
Lucile D. Miller,
Florence K. Cook,
Beatrice M. Goodwin,
Clara L. McAndrews.

354 And afterwards, to wit, on the 10th day of October, 1946, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

355 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—45-C-1148) * *

Thursday, October 10, 1946

Present: Honorable John P. Barnes, District Judge.

This cause now coming on for further trial again come the parties to this suit by their attorneys, respectively, and the Jury heretofore empaneled and sworn herein also come and the trial of this cause proceeds; the motion of

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the defendant by counsel for a directed verdict is denied, the final arguments of counsel are heard, the Court instructs the Jury and the Jury retire to their rooms with sworn Marshals to consider of their verdict and thereafter the Jury return into open Court and render their verdict and answer to special interrogatory and on their oath do say:

"Verdict

We, the Jury, find the defendant guilty and assess the plaintiff's damages at the sum of fifteen Thousand $15,000.00 Dollars
_____Cents
($_____)."

and

"Special Interrogatory

Did the defendant unlawfully equip or maintain on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act?
Answer: Yes."

and

356 It Is Ordered that said verdict be filed together with the special interrogatory and

It Is Considered and Ordered by the Court that the plaintiff, Alfred S. Penn, do have and recover of and from the defendant, Chicago & North Western Railroad Company, a Corporation, his damages in the sum of Fifteen Thousand Dollars ($15,000.00) in form as by the Jury assessed together with his costs and charges in this behalf expended and have execution therefor.

357 And afterwards on, to wit, the 18th day of October, 1946 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion in words and figures following, to wit:

358 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—45-C-1145) * *

MOTION OF DEFENDANT FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL AND FOR A REMITTITUR AND TO SET ASIDE ANSWER TO JURY TO SPECIAL INTERROGATORY.

Now comes defendant, after the jury has returned its verdict against defendant and awarded damages to plaintiff, and the court having entered judgment on the same, and moves the court to enter judgment in favor of defendant notwithstanding the verdict, and for grounds for said motion and for the entry of said judgment states:

1. The court erred in denying defendant's motion at the close of all the evidence to instruct the jury to find defendant not guilty.

2. The court erred in refusing to give to the jury the instruction at the close of all the evidence to find defendant not guilty.

3. At the close of all the evidence there had been introduced no substantial evidence tending to prove the allegations of plaintiff's complaint.

Defendant further moves the court that in the alternative to the foregoing motion for judgment notwithstanding the verdict, it set aside the verdict of the jury rendered at the close of the trial of the above entitled cause and grant a new trial in said cause and for a new trial specifies the following grounds:

359 1. The verdict is contrary to the law and to the evidence and is against the manifest weight of the evidence.

2. The verdict is not supported by a preponderance or by sufficient evidence.

3. The court erred in denying defendant's motion at the close of all the evidence to instruct the jury to find defendant not guilty.

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4. The court erred in giving to the jury plaintiff's instructions B, E and P, which are as follows:

B.

"You are instructed that it is provided by the Federal Employers Liability Act that every common carrier by railroad, while engaging in commerce between any of the several states, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

E.

"If you believe from a preponderance of the evidence that the coupler on the car in question was defective in that the same could not be uncoupled by means of the pin lifter, and that the plaintiff at the time he was injured was attempting to uncouple said coupler and was injured as a direct and proximate result of said alleged defective condition thereof, you should find the defendant guilty."

P.

"If from the greater weight of the evidence in this case, under the instructions of the Court, the jury finds the defendant guilty and that the plaintiff sustained injuries as a direct and proximate result of the accident in question, then you will be required to determine and assess the amount of the plaintiff's damages.

"In determining the amount of damages, if any, the plaintiff is entitled to recover in this case, the jury may take into consideration all the facts and circumstances pertaining to that subject proved by the evidence. You may consider what evidence, if any, there is of (1) the nature and extent of plaintiff's physical injuries, if any, and the permanency of such injuries; (2) the physical disability of the plaintiff resulting from such injuries, and such further physical disabilities and loss of health, if any, as are reasonably certain to result to the plaintiff from such alleged injuries; (3) the physical pain the plaintiff has suffered as a direct and proximate result of such alleged injuries, and such further pain and suffering, if

any, as are reasonably certain to result to the plaintiff
360 from such alleged injuries; (4) the loss of earnings sustained by the plaintiff as a direct result of such alleged injuries, and such future loss of earnings and inability to work as are reasonably certain to result from such alleged injuries; and the jury may find for the plaintiff such a sum, if any, as in the judgment of the jury, under the evidence and instructions of the Court in this case, will be a fair and reasonable compensation for any such injuries and damages, if any, the plaintiff as a direct and proximate result of the accident in question has sustained or will sustain in so far, if at all, as such damages and injuries are alleged in the complaint and proven by the greater weight of the evidence."

5. The court erred in refusing to give to the jury defendant's requested instruction 8, which is as follows:

"If you find from the evidence that at the time and place in question plaintiff did in fact uncouple said cars by means of said pin lifter, then you should find defendant not guilty as to the charge in plaintiff's complaint that defendant carelessly, negligently and unlawfully equipped and maintained on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act."

6. Plaintiff failed to prove that defendant was guilty of negligence as charged in plaintiff's complaint and likewise failed to prove that negligence, if any, on the part of the defendant was the proximate cause of plaintiff's alleged injuries.

7. The court erred in admitting evidence offered by plaintiff and objected to by defendant.

8. The verdict of the jury is grossly excessive in amount.

9. The verdict of the jury is so grossly excessive in amount as to show passion, prejudice and ill will on the part of the jury against defendant and to show undue sympathy on the part of the jury for plaintiff.

10. The verdict of the jury is so grossly excessive in amount as to show a misunderstanding on the part of the jury as to the measure and elements of damages which would be warranted by the evidence.

Defendant further asks that in the alternative a remittitur be ordered by the court for the reason that said verdict is excessive as hereinabove stated.

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361 Defendant further asks that the answer of the jury to the special interrogatory be set aside for the reason that it is wholly unsupported by the evidence and is against the preponderance and manifest weight of the evidence.

Drennan J. Slater,
James B. O'Shaughnessy,
Attorneys for Defendant.

362 And afterwards, to wit, on the 8th day of November, 1946, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

363 In the District Court of the United States.

* * (Caption—45-C-1148) * *

Friday, November 8, 1946

Present: Honorable John P. Barnes, District Judge.

This cause now coming on for hearing on the motion of the defendant for judgment notwithstanding the verdict, or, in the alternative for a new trial and for a remittitur and entry of an order setting aside the answer of the Jury to the special interrogatory herein come the parties by their attorneys and the Court having heard the arguments of counsel and being fully advised in the premises

It Is Ordered that said motion be and it is hereby overruled and denied

364 And afterwards on, to wit, the 15th day of November, 1946 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal in words and figures following, to wit:

365 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Alfred S. Penn,
Plaintiff-Appellee,
vs.
Chicago & North Western Railroad Company, a corporation,
Defendant-Appellant.
No. 45-C-1148

NOTICE OF APPEAL.

Notice Is Hereby Given that defendant hereby appeals in the above entitled cause to the Circuit Court of Appeals for the Seventh Circuit from the judgment entered in said cause in the District Court of the United States for the Northern District of Illinois, Eastern Division, on October 10, 1946, in favor of plaintiff and against defendant in the sum of Fifteen Thousand Dollars ($15,000.00) damages, with costs.

Judgment desired from the reviewing court by way of relief is the reversal of said judgment hereby appealed from and for judgment in favor of appellant, or remanding of said cause to the District Court of the United States for the Northern District of Illinois, Eastern Division, to enter judgment for defendant notwithstanding the verdict, or to grant defendant's motion for a new trial, or for such other relief as the record in said cause demands and to the court seems meet.

Dated this 15th day of November, 1946.

Chicago and North Western Railway Company, a corporation,
By Drennan J. Slater,
James B. O'Shaughnessy,
Its Attorneys.

(Attached hereto is the following certificate):

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366 IN THE DISTRICT COURT OF THE UNITED STATES.
For the Northern District of Illinois,
Eastern Division.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 15th day of November, 1946, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Mr. Royal Irwin
29 South La Salle Street
Chicago 3, Illinois.

Roy H. Johnson,
Clerk.

(Seal)

367 And afterwards on, to wit, the 19th day of November, 1946, came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement Of Points Relied On, in words and figures following, to wit:

368 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—45-C-1148) * *

STATEMENT OF POINTS RELIED ON BY APPELLANT.

Now comes defendant-appellant and states that the following are the points on which it intends to rely on the appeal:

1. The verdict is wholly unsupported by the evidence.
2. The court erred in denying defendant's motion at the close of all the evidence to instruct the jury to find defendant not guilty.

3. The court erred in giving to the jury plaintiff's instruction "E", which is as follows:

"If you believe from a preponderance of the evidence that the coupler on the car in question was defective in that the same could not be uncoupled by means of the pin lifter, and that the plaintiff at the time he was injured was attempting to uncouple said coupler and was injured as a direct and proximate result of said alleged defective condition thereof, you should find the defendant guilty."

4. The court erred in giving to the jury plaintiff's instruction "P", which is as follows:

"If from the greater weight of evidence in this case, under the instructions of the Court, the jury finds the defendant guilty and that the plaintiff sustained injuries as a direct and proximate result of the accident in question, then you will be required to determine and assess the amount of the plaintiff's damages.

"In determining the amount of damages, if any, the plaintiff is entitled to recover in this case, the jury may take into consideration all the facts and circumstances pertaining to that subject proved by the evidence. You may consider what evidence, if any, there is of (1) the nature and extent of plaintiff's physical injuries, if any, and
369 the permanency of such injuries; (2) the physical disability of the plaintiff resulting from such injuries, and such further physical disabilities and loss of health, if any, as are reasonably certain to result to the plaintiff from such alleged injuries; (3) the physical pain the plaintiff has suffered as a direct and proximate result of such alleged injuries, and such further pain and suffering, if any, as are reasonably certain to result to the plaintiff from such alleged injuries; (4) the loss of earnings sustained by the plaintiff as a direct result of such alleged injuries, and such future loss of earnings and inability to work as are reasonably certain to result from such alleged injuries; and the jury may find for the plaintiff such a sum, if any, as in the judgment of the jury, under the evidence and instructions of the Court in this case, will be a fair and reasonable compensation for any such injuries and damages, if any, the plaintiff as a direct and proximate result of the accident in question has sustained or will sustain insofar, if at all, as such damages and injuries are alleged in the complaint and proven by the greater weight of the evidence."

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5. The verdict of the jury is so grossly excessive in amount as to clearly evince passion, prejudice and ill will on the part of the jury against defendant and to show undue sympathy on the part of the jury for plaintiff.

Drennan J. Slater,
James B. O'Shaughnessy,
Attorneys for Defendant-Appellant.

370 State of Illinois, } ss.
County of Cook. }

Mary Boylen, being first duly sworn, on oath deposes and says that she caused a copy of the above and foregoing Statement of Points Relied on by Appellant to be served on: Mr. Royal W. Irwin, 29 South LaSalle Street, Chicago, Illinois; by placing a true and correct copy of said document in an envelope so addressed, placing proper postage on said envelope, and depositing the same in the United State Post Office Mail box at 400 West Madison Street, Post Office Mail box at 400 West Madison Street, Chicago, Illinois, on the 15th day of November, 1946 at the hour of 2:10 P. M.

Mary Boylen.

Subscribed And Sworn to before me this 15th day of November, A. D. 1946.

Margaret C. Carmody, (signed)
Notary Public.

(Seal)

371 And on the same day, to wit, the 19th day of November, 1946, came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Designation Of Portions Of The Record, Proceedings And Evidence To Be Contained In Record On Appeal, in words and figures following, to wit:

372 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—45-C-1148) * *

DESIGNATION OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN RECORD ON APPEAL.

The Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, is hereby requested to make up an authenticated transcript of the record, proceedings and evidence in the above entitled cause so it will contain the following:

1. Complaint filed by plaintiff.
2. Answer of defendant to complaint.
3. Motion of defendant for directed verdict made at the close of all the evidence.
4. Order of court denying motion for directed verdict.
5. Verdict of jury in the amount of $15,000.
6. Special interrogatory and answer of jury thereto.
7. Motion of defendant for judgment notwithstanding the verdict or, in the alternative, motion for new trial and for a remittitur and to set aside answer of jury to special interrogatory.
8. Order of court denying motion for judgment notwithstanding the verdict, etc.
9. Judgment on the verdict in the amount of $15,000 and costs.
10. Notice of appeal from said judgment of the court.
11. Certificate of Clerk showing mailing of notice of appeal.

373 12. Designation of portions of the record, proceedings and evidence to be contained in record on appeal.

13. Condensed statement in narrative form of evidence and proceedings.
14. Statement of points upon which appellant intends to rely on this appeal.

Chicago and North Western Railway
Company, a corporation,
By Drennan J. Slater,
James B. O'Shaughnessy,
Its Attorneys.

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374 State of Illinois, } ss.
County of Cook. }

Mary Boylen, being first duly sworn, on oath deposes and says that she caused a copy of the above and foregoing Designation of Portions of the Record, Proceedings and Evidence to be Contained in Record on Appeal to be served on: Mr. Royal W. Irwin, 29 South LaSalle Street, Chicago, Illinois; by placing a true and correct copy of said document in an envelope so addressed, placing proper postage on said envelope, and depositing the same in the United States Post Office Mail box at 400 West Madison Street, Chicago, Illinois, on the 15th day of November, 1946, at the hour of 2:10 P. M.

Mary Boylen.

Subscribed And Sworn to before me this 15th day of November, A. D. 1946.

Margaret C. Carmody, (signed)
Notary Public.

(Seal)

375 And afterwards on, to wit, the 22nd day of November, 1946, came the Appellee by his attorneys and filed in the Clerk's office of said Court his certain Designation Of Additional Portions Of Record, Proceedings And Evidence To Be Contained In The Record On Appeal, in words and figures following, to wit:

376 In the District Court of the United States.

* * (Caption—45-C-1148) * *

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL.

The Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, is hereby directed to include in the record on appeal the following:

1. The entire testimony of each witness in full as contained in the transcript of proceedings.
2. Photographs marked Exhibits 7, 8 and 9.

3. Statement signed by the plaintiff marked Defendant's Exhibit 3.

4. Report of accident on Form 148 signed by Raymond P. Klasen.

5. Statement signed by Archie Wescott marked Plaintiff's Exhibit 1.

6. Statement signed by Harry R. Fairchild.

377 7. The entire proceedings on October 10, 1946, at 10:00 o'clock A. M., before the Court out of the presence of the jury, wherein counsel made objections to tendered instructions and the Court indicated his intention to give certain instructions and refuse other instructions as contained in the transcript of proceedings.

8. Instructions given by the Court to the jury as contained in the transcript of proceedings.

Royal W. Irwin,
Attorney for Plaintiff-Appellee.

Received a copy of the above and foregoing Designation of Additional Portions of Record Proceedings and Evidence to be Contained in the Record on Appeal this 22nd day of November, 1946.

Drennan J. Slater,
Attorney for Defendant-Appellant.

378 Northern District of Illinois, } ss.
Eastern Division. }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designations filed in this Court in the cause entitled: Alfred S. Penn, Plaintiff, *vs.* Chicago & North Western Railroad Company, a corporation, Defendant, No. 45-C-1148, as the same appear from the original records and files thereof now remaining in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 4th day of December, A. D. 1946.

Roy H. Johnson,
Clerk.

(Seal)

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UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of the record filed in this Court on the tenth day of July, 1947, in:

Cause No. 9253.

Alfred S. Penn, *Plaintiff-Appellee,*

vs.

Chicago & North Western Railroad Company, *Defendant-Appellant,*

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of February, A. D. 1948.

Kenneth J. Carrick,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the First day of October, in the year of our Lord One thousand nine hundred and forty-six, and of our Independence the one hundred and seventy-first.

No. 9253. Chicago & Northwestern Railway Company,

Alfred S. Penn, *Plaintiff-Appellee,* *vs.* Northwestern Railway Company, *Defendant-Appellant.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit, on the eleventh day of December, 1946, there was filed in the office of the Clerk of this Court an appearance of counsel for the appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Cause No. 9253.

Alfred S. Penn,
Plaintiff-Appellee,

vs.

Chicago & North Western Railroad Company,
Defendant-Appellant.

The Clerk will enter our appearance as counsel for Appellant.

Drennan J. Slater,
400 W. Madison Street,
Chicago, Illinois.
James B. O'Shaughnessy,
400 W. Madison Street,
Chicago, Illinois.

Endorsed: Filed Dec. 11, 1946. Kenneth J. Carrick, Clerk.

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And on the same day, to-wit: on the eleventh day of December, 1946, there was filed in the office of the Clerk of this Court an appearance of counsel for the appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Cause No. 9253.

Alfred S. Penn,
Plaintiff-Appellee,

vs.

Chicago & North Western Railroad Company,
Defendant-Appellant.

The Clerk will enter my appearance as counsel for Appellee.

Royal W. Irwin,
20 So. La Salle Street,
Chicago 3, Illinois.

Endorsed: Filed Dec. 11, 1946. Kenneth J. Carrick, Clerk.

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And afterwards, to-wit, on the fourteenth day of October, 1947, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Tuesday, October 14, 1947.

Before:
Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

No. 9253.	Alfred S. Penn, *Plaintiff-Appellee*, *vs.* Chicago & Northwestern Railway Company, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Drennan J. Slater counsel for the Appellant, and by Mr. Royal W. Irwin counsel for the Appellee, and the Court takes this matter under advisement.

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And afterwards, to-wit, on the sixth day of November, 1947, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9253. October Term and Session, 1947.

ALFRED S. PENN,
Plaintiff-Appellee,
vs.
CHICAGO & NORTH WESTERN RAILWAY COMPANY,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

November 6, 1947.

Before SPARKS and MAJOR, *Circuit Judges,* and LINDLEY, *District Judge.*

MAJOR, *Circuit Judge.* This appeal is from a judgment in plaintiff's favor, entered October 10, 1946, in a suit brought under the Federal Employers' Liability Act, based on an alleged violation of the Federal Safety Appliance Act, 45 U.S.C.A. Par. 2, which requires a railroad engaged in interstate commerce to equip its cars with couplers "which can be uncoupled without the necessity of men going between the ends of the cars."

The complaint, at the time the case went to the jury, contained the single charge that the defendant "carelessly, negligently and unlawfully equipped and maintained on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act."

Two grounds are urged for reversal, (1) that the court erroneously refused to direct a verdict in favor of the defendant, and (2) that the jury was improperly instructed.

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In reviewing the action of the lower court in refusing to direct a verdict, we must, of course, consider the evidence in the light most favorable to the plaintiff's case. Here, the plaintiff was the sole occurrence witness offered in his behalf. The record contains no direct evidence of any defect in the coupler mechanism, and any defect which existed must be inferred from the circumstances as related by the plaintiff.

At the time of the accident resulting in plaintiff's injury, the defendant was engaged in classifying cars. Plaintiff was a brakeman and it was his duty to uncouple cars so that they might be shunted onto various tracks in the yard. The car to be uncoupled was equipped with the usual automatic coupler, operated by a rod about four and one-half feet long, with the outside end bent to form a handle. Shortly prior to the accident, plaintiff mounted the car next to the one to be uncoupled, standing on the stirrup. He states that while thus positioned he made five or six unsuccessful attempts to operate the coupler. While the record does not disclose definitely where the plaintiff should have been positioned in order to operate the coupler, we think it is evident that he was not in a proper position while on the adjacent car. He testified that he placed himself on the car because it was hot and it became rather tiresome running fifteen or twenty feet every few minutes in order to pull pins. In a statement made previous to the trial and offered in evidence, he stated, "The pin lifter was about 3 and a half feet from where I hung on the ladder. This is further away than usual and I could not pull it because I did not have sufficient leverage stretched out as I was to pull out and up on the pin and hang on at the same time."

After having attempted unsuccessfully to operate the coupler from this awkward position, he stepped upon the ground and ran along beside the cars which were moving at a speed of from six to eight miles per hour. While thus running, he stated that he took three or four steps and during that time made three attempts (at a previous trial plaintiff stated two attempts) to lift the pin, that on the third the pin lifted, the coupler operated and the leading car was cut off and went on down the track as intended. At the time he succeeded in lifting the pin and uncoupling the car his foot went into a space between a switch rod and the switch ties at No. 35 switch stand. This space had a rod running down the middle between the two ties.

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It was the stepping in this space which resulted in the injuries complained of.

The plaintiff testified that the car at the time he boarded it was about fifty or sixty feet from No. 35 switch and that after he stepped on the ground he traveled three or four steps before reaching the switch. All of this happened while the train was traveling from six to eight miles per hour. It is thus obvious that only a few seconds at the most elapsed between the time he boarded the car and that of the accident, and only a second or two between the time he stepped on the ground and that of the accident.

We are of the view that this evidence was insufficient to take the case to the jury. Certainly it did not prove that the coupler was defective "in that the same could not be uncoupled by means of the pin lifter," as alleged in the complaint, for the reason that the pin was lifted and the cars uncoupled. The purpose of the statute upon which plaintiff's cause was predicated was to enable the employe to couple and uncouple cars without the necessity of going between the end of such cars. *St. Louis & San Francisco R. R. Co.* v. *Conarty*, 238 U. S. 243, 250. There is no pretense, of course, in the instant case that the plaintiff received his injuries because he was required to or did go between the end of the cars. Plaintiff, however, contends that the fact that plaintiff made unsuccessful efforts to operate the coupler, even though he subsequently succeeded, is proof of its defective condition. None of the cases relied upon support such an extreme contention. At most they hold that proof of a failure to operate is sufficient to raise a jury question. In *Chicago, Rock Island and Pacific Railway Co.* v. *Brown*, 229 U. S. 317, such was the holding upon a factual situation stated by the court as follows (page 319):

> "The uncoupling was to be done by means of shoving the cars in motion. Had the safety appliance been in order, this could have been accomplished by defendant in error while walking at the side of the train. But the safety appliance on the side of the car on which he was working at the time would not operate. He gave three or four jerks to it, which failed to open the coupler."

The facts further show that the plaintiff after failure to open the coupler undertook to lift the coupler pin with his hand, and while thus engaged received an injury.

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In *Chicago, M., St. P. & P. R. R. Co.* v. *Linehan,* 66 F. 2d 373, the court held that a coupler which does not open after the application of force sufficient to open it if the coupler is in proper working condition does not meet the statutory requirements. There again, after plaintiff's failure to operate the coupler, he went between the cars for the purpose of adjusting the defective knuckle and while so engaged was injured. The court states (page 378):

> "The question must be, Was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition? If under such circumstances the knuckle does not open and men are required to go between the cars to adjust the coupler and open the knuckle, the coupler does not meet the requirements of the act."

Atchison, T. & S. F. Ry. Co. v. *Keddy,* 28 F. 2d 952, is another case where the coupler would not operate and plaintiff was injured when he went between the cars for the purpose of adjusting the defective knuckle.

It is not necessary to refer to other cases where it has been held that the failure of a coupler to operate is proof of a defective condition. Such cases are of little or no benefit to the plaintiff in the instant case where the coupler did operate when sufficient force was applied and when plaintiff was positioned so that such force became effective. It is plain, so we think, that he was not in a proper position to operate the coupler while stationed on the side of the car. Plaintiff recognized this situation and placed himself on the ground for the purpose of performing the operation. Although he states that he made the third attempt before he succeeded, it is evident that the coupler operated within a second or two after plaintiff had thus positioned himself. Certainly the fact that it did not operate while he was awkwardly positioned on the car is no proof of defect, and we think the fact that it operated so readily after he was properly positioned dispels any inference of defect that might arise from his previous unsuccessful efforts.

In our view, there is no substantial evidence to sustain the verdict. The judgment appealed from is therefore reversed and the cause remanded, with directions to grant the defendant's motion for a judgment in its favor, notwithstanding the verdict.

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And on the same day, to-wit, on the sixth day of November, 1947, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Thursday, November 6, 1947.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

No. 9253.	Alfred S. Penn, *Plaintiff-Appellee*, *vs.* Chicago & Northwestern Railway Company, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and the same is hereby remanded to the said District Court with directions to grant the defendant's motion for a judgment in its favor, notwithstanding the verdict.

And afterwards, to-wit, on the twenty-first day of November, 1947, there was filed in the office of the Clerk of this Court the Appellee's petition for a rehearing, which said petition is not set forth here.

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And afterwards, to-wit, on the first day of December, 1947, there was filed in the office of the Clerk of this Court the Appellant's answer to the Appellee's petition for rehearing which said answer is not set forth here.

And afterwards, to-wit, on the third day of December, 1947, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Wednesday, December 3, 1947.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

No. 9253.	Alfred S. Penn, *Plaintiff-Appellee*, *vs.* Chicago & Northwestern Railway Company, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

And afterwards, to-wit, on the eleventh day of December, 1947, the mandate of this Court was issued to the said District Court of the United States for the Northern District of Illinois, Eastern Division.

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UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of proceedings had and papers filed in this Court (excepting briefs of counsel, motions, stipulations, and an order of December 16, 1946, in re: printing the record) in:

Cause No. 9253.

Alfred S. Penn,
Plaintiff-Appellee,

vs.

Chicago & North Western Railroad Company,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of February, A. D. 1948.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 5, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FEB 16 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 1030 19

ALFRED S. PENN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROYAL W. IRWIN,
Attorney for Petitioner.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No._____

ALFRED S. PENN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Alfred S. Penn respectfully shows:

(1) Violation of the Federal Safety Appliance Act.

The petitioner (plaintiff in the trial court) brought an action against the respondent (defendant in the trial court) for damages resulting from personal injuries in the United States District Court for the Northern District of Illinois, Eastern Division.

It was alleged in the complaint that the respondent unlawfully equipped and maintained a defective coupler on a

freight car, in that the same could not be uncoupled by means of a pin lifter, contrary to the provisions of the Federal Safety Appliance Act. (R. 3.)

The petitioner was a switchman employed by the respondent in switching cars in the Proviso Yard. (R. 10.) The respondent was engaged in classifying cars, and in doing so it was the duty of the petitioner to uncouple cars from the train in order that they might be shunted onto the various tracks in the yard. (R. 12.) At the time of the accident the respondent intended to shunt a certain car onto a switch track, and to do so the petitioner stood upon the stirrup of the car to be cut off in order that he might uncouple that car when it attained sufficient momentum to carry it to its destination.

It was necessary for the petitioner to hold onto a grab iron with one hand, and, while standing on the sill step, reach over with the other hand and pull on the pin lifter.

The complaint made by the petitioner was that the pin lifter did not uncouple the cars, when he attempted to lift it, as it should have done, and, after making several attempts to uncouple the car by means of the pin lifter, the petitioner got upon the ground and ran along beside the car, where he believed he could better accomplish the act. After making three or four attempts to uncouple the car by means of the pin lifter while running along beside the car, he finally got it to work, but at that moment he stepped into a hole in the roadbed and broke his leg. (R. 16.)

What actually occurred is best expressed by the testimony of the petitioner himself. The following appears on pages 15 and 16 of the transcript:

> "Q. And when you got hold of this pin lifter on the outside end, what did you do to it?
>
> A. Whenever I got the slack, I made an effort to lift it.

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Q. When you pulled on the pin lifter, what did it do?
A. It did not function.
Q. It did not function. What did you do then?
A. I made another effort, a harder effort to get it.
Q. How did you do it?
A. I jerked harder.
Q. What happened to the pin lifter then?
A. Just like it was.
Q. What did you do after that?
A. I made about five or six efforts to get it, on the car.
Q. You mean, while you were standing on the car?
A. While I was standing on the car.
Q. Did the pin lifter work while you were standing on the car?
A. It did not.
Q. You said you waited for the slack. What do you mean by that?
A. Just as soon as they kick these cars, when all of the weight comes together, you can operate that pin. Otherwise you can't.
Q. How far do the cars have to move before you can operate the pin?
A. Just as soon as the slack comes in.
Q. What is that?
A. Just as soon as they come together.
Q. Had they come together before you operated the pin or afterwards?
A. They was together when I operated the pin.
Q. When you tried to operate it?
A. When I tried to operate it.
Q. And did the pin lifter operate at that time?
A. Not until after I got off the car.
Q. Should it have operated at that time?
A. It should.
Q. Why did you get off the car?
A. Well, I was wearing myself down making a stronger effort to try to get it. I thought if I could get off, it would be easier, and I could get it.
Q. What did you do?
A. I stepped off, and made three efforts.

Q. And what happened to the pin?
A. It come.
Q. What happened to you?
A. I went in a hole.
Q. What hole?
A. Between the ties.
Q. At the time that the pin lifter came, at the time it operated, was that the first time that it operated?
A. It was.
Q. What did you do to make it operate?
A. Three times I gave it all I had, after I got on the ground.
Q. You mean while you were running along?
A. Yes, sir.
By Mr. Irwin: Q. What did your foot go into?
A. Between the rod, the tie rod and the tie."

The issue upon the trial was whether the respondent furnished a coupler which was defective, contrary to the provisions of the Federal Safety Appliance Acts.

The jury returned a verdict finding the respondent guilty and assessing petitioner's damages at the sum of $15,000.

An appeal was taken by respondent to the Circuit Court of Appeals for the Seventh Circuit, and that Court reversed the judgment and remanded the cause with directions to grant the defendant's motion for a judgment in its favor notwithstanding the verdict.

This petition is filed to induce the Supreme Court of the United States to reverse the judgment of the Circuit Court of Appeals.

(2) Basis of Jurisdiction.

The jurisdiction of this court is invoked under the provisions of the Federal Employers' Liability Act. (45 U. S. C. A. 287, Sec. 56.)

The decision was rendered by the Circuit Court of Ap-

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peals on November 6, 1947. The petition for rehearing was denied December 3, 1947.

This case is reported in 163 Fed. (2d) 995.

(3) Questions Presented.

The Circuit Court of Appeals erroneously found that "plaintiff mounted the car next to the one to be uncoupled" and "after having attempted to unsuccessfully operate the coupler from this awkward position he stepped upon the ground"; also that "certainly the fact that it did not operate while he was awkwardly positioned on the car is no proof of defect."

The petitioner testified:

> "Q. Which car did you get on?
> A. I got on the north—I got on the first car, the car that was supposed to be cut off." (R. 3.)

Thus it appears that the Circuit Court of Appeals has erroneously decided the case upon a false factual situation. This error was called to the attention of the Circuit Court of Appeals in a petition for rehearing filed in that court.

Although petitioner testified that when the pin lifter did not function he made a harder effort to get it and jerked harder on it about five or six times while standing on the car; not being able to operate it (R. 5), and, as he said, "wearing myself down making a stronger effort to try to get it," he made three efforts to operate the pin lifter when running along beside the car. He testified: "Three times I gave it all I had after I got on the ground." (R. 6.)

The Circuit Court of Appeals found that it was plain that he was not in a proper position to operate the coupler, and the fact that it operated so readily after he was properly positioned dispels any inference of defect that might arise from his previous unsuccessful efforts.

In these circumstances the question is: May the Circuit Court of Appeals reweigh the evidence and hold for naught the finding of the jury?

(4) Reasons for Allowance of Writ.

The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. It is obvious that a pin lifter which fails to operate efficiently renders the coupler defective, contrary to the provisions of the Federal Safety Appliance Act. The Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of the Supreme Court of the United States. It is submitted that these reasons call for the exercise of this Court's power of review.

WHEREFORE petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court commanding the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this Court for its review and determination, on a day certain named therein, a complete transcript of the record in the case numbered and entitled on its docket as No. 9253, Alfred S. Penn, Plaintiff-Appellee *vs.* Chicago and North Western Railway Company, Defendant-Appellant; that the judgment of the Circuit Court of Appeals be reversed by this Court; and that the petitioner may have such other and further relief as seems just.

Respectfully submitted,

ALFRED S. PENN,
Petitioner,
By ROYAL W. IRWIN,
Attorney for Petitioner.

Royal W. Irwin,
29 S. La Salle Street,
Chicago, Illinois.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No.....

ALFRED S. PENN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Verdict Was Sustained by the Evidence.

The Circuit Court of Appeals made an egregious error in finding from the evidence that the petitioner mounted the car next to the one to be uncoupled and that he unsuccessfully attempted to operate the coupler "from this awkward position."

The opinion of the Circuit Court of Appeals is based upon a false premise. The petitioner testified: "I got on the first car, the car that was supposed to be cut off." (R. 13.)

No witness testified that "plaintiff mounted the car next to the one to be uncoupled," as stated in the opinion.

Upon this false premise the Court held: "It is plain, so we think, that he was not in a proper position to operate the coupler."

The opinion of the Circuit Court of Appeals seems to hold that in their belief the petitioner failed to use a reasonable effort to bring about the opening of the coupler—that, in the face of the testimony of the petitioner that in his effort to open the coupler he jerked harder (R. 15), that he was wearing himself down making a stronger effort to try to get it, and that three times after he got on the ground he gave it all he had. (R. 16.)

These were all jury questions. The jury must have found that the petitioner was in the proper position on the car to be cut off. There was no evidence upon which they could have found that he was in an improper position. The jury must have found that from his various efforts to operate the pin lifter it had failed to work efficiently. The Circuit Court of Appeals is without jurisdiction to arbitrarily discard evidence supporting the petitioner's claim.

In the case of *Lavender* v. *Kurn*, 327 U. S. 645, 653, the Court said:

> "Only when there is a complete absence of probative facts to support the conclusions reached does a reversible error appear."

And in *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649, the Court said:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

The decisions of the Supreme Court of the United States

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in recent years have made it clear that the jury is the arbiter of the facts in cases arising under the Federal Employers' Liability Act. The refusal of some courts to follow the clear mandate of the Supreme Court of the United States baffles explanation.

The opinion of the Circuit Court of Appeals states:

> "We think the fact that it operated so readily after he was properly positioned dispels any inference of defect that might arise from his previous unsuccessful efforts."

Thus the Court assumes the position of jury. The pin lifter should have operated when petitioner rode upon the side of the car in the proper position. The Circuit Court of Appeals overlooks the fact that by reason of the failure of the pin lifter to operate when petitioner was in his proper position on the side of the car he was compelled to do a much more dangerous thing, namely, to run along the roadbed beside the car while it was moving. The ties, ballast and roadbed are uneven and frequently there are holes and places where tie rods pass through. The danger to petitioner was enhanced by having to run along beside the car where there was danger of doing just what petitioner did, namely, stumbling in a hole and breaking his ankle. We cannot say that the Circuit Court of Appeals would make a good jury.

There has been an attempt on the part of the Circuit Court of Appeals for the Seventh Circuit as well as other Circuit Courts of Appeal and State Courts to deny that the lack of efficiency in the operation of a pin lifter is evidence of a defective condition. (*Chicago, M., St. P. & Pac. R. Co.* v. *Linehan*, 66 Fed. (2d) 373; *Meisenhelder* v. *Byram*, 233 N. W. 849; *Western & Atl. R. R. Co.* v. *Gentle*, 198 S. E. 257; *C. & O. Ry. Co.* v. *Charlton*, 247 Fed. 34.)

The defect in the coupler in this case may have consisted

of its defective condition or its defective functional operation. There was evidence that in fact the pin lifter did not work efficiently. This is evidence sufficient to sustain the charge of a violation of the Federal Safety Appliance Acts.

In the case of *Myers* v. *Reading Co.*, 331 U. S. 477, the Court said:

> "'Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance. *Philadelphia & R. R. Co.* v. *Auchenbach*, 3 Cir., 16 F. 2d 550. Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate. • • •
>
> • • • • •
>
> "'• • • the testimony of plaintiff that the brake was used in the normal and usual manner and failed to work efficiently but did so inefficiently, throwing him to the ground, is such substantial evidence of inefficiency as to make an issue for the jury.'"

It Was Error to Enter Judgment Against the Plaintiff.

The complaint charged that the pin lifter was defective. The only evidence upon the trial as to the condition of the pin lifter was that of the petitioner, who testified that it failed to work efficiently. The Circuit Court of Appeals in its judgment found: "There is no substantial evidence to sustain the verdict."

If there was no substantial evidence to sustain the verdict, then a new trial should have been granted in order to allow the plaintiff to produce other sufficient evidence of the defectiveness of the pin lifter. None of respondent's

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car inspectors were called to testify as to the condition of the appliance after the accident.

In the case of *Stewart* v. *Southern Railway*, 315 U. S. 283, an identical situation existed. It was claimed that the deceased was killed by reason of a defective pin lifter. A judgment for the plaintiff was reversed by the Circuit Court of Appeals, the Court holding that there was no substantial evidence to sustain the verdict, and the cause was remanded with directions to enter judgment for the respondent. Upon certiorari to the Supreme Court of the United States, this Court held (page 286):

> "If the issue as to the condition of the coupler was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject."

PRAYER.

It is urged that this Petition for Certiorari be granted to permit a full consideration of the matters involved, to the end that the judgment of the Circuit Court of Appeals be reversed.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Petitioner.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 19

ALFRED S. PENN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF FOR PETITIONER.

ROYAL W. IRWIN,
Attorney for Petitioner.

ROYAL W. IRWIN,
29 South La Salle Street,
Chicago 3, Illinois.

THE DUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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Summary of Argument.

Section 2 of the Safety Appliance Acts provides that it shall be unlawful for a common carrier to permit to be used any car not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars 8

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 19

ALFRED S. PENN.

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Responodent.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

Petitioner, Alfred S. Penn (plaintiff below) brought an action against Respondent (defendant below) for damages sustained from personal injuries alleged to have resulted from a violation of the Federal Safety Appliance Acts.

It was alleged in the complaint that the defendant unlawfully equipped and maintained a defective coupler on a freight car in that the same could not be uncoupled by means of a pin lifter, contrary to the provisions of the Federal Safety Appliance Acts.

The case was tried in the District Court and resulted in a judgment in favor of the plaintiff for $15,000.

An appeal was taken by the defendant to the Circuit Court of Appeals for the Seventh Circuit, which Court reversed the judgment and remanded the case to the District Court with directions to enter judgment for the defendant.

This Court granted the plaintiff's Petition for Certiorari, and the case is here for argument upon the merits.

The case is reported in 163 Fed. (2d) 995.

PROPOSITIONS OF LAW RELIED UPON.

Safety Appliance Acts.

It shall be unlawful for any common carrier to permit to be used any car not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.

45 U. S. C. A. 18.

Roberts Federal Liabilities of Carriers, Vol. 2, 2nd Edition, 1213.

A coupling appliance will be regarded as defective if there is proof that the mechanism failed to work efficiently.

Myers v. *Reading*, 331 U. S. 477.

Chicago, Rock Island & Pac. Ry. Co. v. *Brown*, 229 U. S. 317.

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. *Popplar*, 237 U. S. 369.

The duty to provide safe couplers and the liability for failure to do so are absolute.

St. Joseph & G. I. R. R. Co. v. *Moore*, 243 U. S. 311.

The principle of *res ipsa loquitur* applies in cases involving a violation of the Safety Appliance Acts.

Minneapolis & St. Paul R. R. Co. v. *Gottschall*, 244 U. S. 66.

Questions of Fact for Jury.

The jury is the arbiter of facts in cases arising under the Federal Employers' Liability Act.

Ellis v. *Union Pacific R. R. Co.*, 329 U. S. 649.

Lavender v. *Kurn*, 327 U. S. 654.

Myers v. *Reading*, 331 U. S. 477.

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ARGUMENT.

Statement of Facts.

The plaintiff was a switchman employed by the defendant in switching cars in the Proviso Yard (Rec. 10). The defendant was engaged in classifying cars, and in doing that work it was the duty of the plaintiff to uncouple cars from the cut as they were being shoved along the tracks in order that the cars might be shunted onto various other tracks in the yard (Rec. 12).

At the time of the accident the defendant intended to shunt a car onto a switch track, and in order to do so the plaintiff stood upon the stirrup of the car to be cut off, to uncouple that car from the cut when it had attained sufficient momentum to carry it to its destination. It was necessary for the plaintiff to hold onto a grab iron with one hand, and while standing on the sill step reach over with the other hand and pull up on the pin lifter. It was claimed by the plaintiff that the pin lifter, when he attempted to lift it, did not uncouple the cars as it should have done, and, after making several attempts to uncouple the car by means of the pin lifter, the plaintiff got upon the ground and ran along beside the car, where he believed he could better accomplish the act. After making three or four attempts to uncouple the car by means of the pin lifter, he accidentally stepped into an opening in the roadbed between a tie and a switch rod and broke his leg. (Rec. 16.)

The pin lifter is a long horizontal rod with a handle at the outer end. It is connected with the knuckle in the coupler, and when it is lifted it uncouples the cars. (Rec. 14.)

What actually occurred is best expressed by the testimony of the plaintiff himself. The following appears on pages 15 and 16 of the record:

"Q. And when you got hold of this pin lifter on the outside end, what did you do to it?

"A. Whenever I got the slack, I made an effort to lift it.

"Mr. Irwin: Q. When you pulled on the pin lifter, what did it do?

"A. It did not function.

"Q. It did not function. What did you do then?

"A. I made another effort, a harder effort to get it.

"Q. How did you do it?

"A. I jerked harder.

"Q. What happened to the pin lifter then?

"A. Just like it was.

"Q. What did you do after that?

"A. I made about five or six efforts to get it, on the car.

"Q. You mean, while you were standing on the car?

"A. While I was standing on the car.

"Q. Did the pin lifter work while you were standing on the car?

"A. It did not.

"Q. You said you waited for the slack. What do you mean by that?

"A. Just as soon as they kick these cars, when all of the weight comes together, you can operate that pin. Otherwise you can't.

"Q. How far do the cars have to move before you can operate the pin?

"A. Just as soon as the slack comes in.

"Q. What is that?

"A. Just as soon as they come together.

"Q. Had they come together before you operated the pin or afterwards?

"A. They was together when I operated the pin.

"Q. When you tried to operate it?

"A. When I tried to operate it.

"Q. And did the pin lifter operate at that time?

"A. Not until after I got off the car.

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"Q. Should it have operated at that time?

"A. It should.

"Q. Well, I was wearing myself down making a stronger effort to try to get it. I thought if I could get off, it would be easier, and I could get it.

"Q. What did you do?

"A. I stepped off, and made three efforts.

"Q. And what happened to the pin?

"A. It come.

"Q. What happened to you?

"A. I went in a hole.

"Q. What hole?

"A. Between the ties.

"Q. At the time that the pin lifter came, at the time it operated, was that the first time that it operated?

"A. It was.

"Q. What did you do to make it operate?

"A. Three times I gave it all I had, after I got on the ground.

"Q. You mean while you were running along?

"A. Yes, sir.

"Mr. Irwin: Q. What did your foot go into?

"A. Between the rod, the tie rod and the tie." (Rec. 15, 16.)

The Circuit Court of Appeals reversed the judgment and remanded the cause with directions to grant the defendant's motion for a judgment in its favor notwithstanding the verdict. The Court in its opinion said:

> "It is not necessary to refer to other cases where it has been held that the failure of a coupler to operate is proof of a defective condition. Such cases are of little or no benefit to the plaintiff in the instant case where the coupler did operate when sufficient force was applied and when plaintiff was positioned so that such force became effective. It is plain, so we think, that he was not in a proper position to operate the coupler while stationed on the side of the car. Plaintiff recognized this situation and placed himself

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on the ground for the purpose of performing the operation. Although he states that he made the third attempt before he succeeded, it is evident that the coupler operated within a second or two after plaintiff had thus positioned himself. Certainly the fact that it did not operate while he was awkwardly positioned on the car is no proof of defect, and we think the fact that it operated so readily after he was properly positioned dispels any inference of defect that might arise from his previous unsuccessful efforts." (Rec. 211.)

Failure of Pin Lifter to Operate.

It was conceded by the Circuit Court of Appeals in its opinion that failure of a coupler to operate is proof of a defective condition. The only question is whether there was evidence in the record of a failure of the coupler to operate.

Cars can be uncoupled only when the slack is in. When the engine starts shoving the cars, the slack is in on all the drawbars. That releases the tension on the pin, and the pin puller can then lift the pin. After the coupling pin has been lifted and the cars uncoupled, the engineer shuts off the throttle and sets the brake, and thus the car cut off is permitted to roll away from the cut of cars. (Rec. 72.)

The plaintiff, while riding on the end of the car, made five or six attempts to uncouple the cars, but the pin lifter did not work. (Rec. 15.) The plaintiff was wearing himself down in his effort to lift the pin lifter, so he decided to get off onto the ground, where he believed he could get it. He stepped off, and while running along beside the cars made three efforts to uncouple the cars when he stepped into a hole, but just at that time the pin lifter operated for the first time. (Rec. 16.)

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The Circuit Court of Appeals erroneously found that "plaintiff mounted the car next to the car to be coupled" (Rec. 209), and "after having attempted to unsuccessfully operate the coupler from this awkward position he stepped upon the ground" (Rec. 209), also that "certainly the fact that it did not operate while he was awkwardly positioned on the car is no proof of defect." (Rec. 211.)

The testimony of the plaintiff was:

> "Q. Which car did you get on?
>
> "A. I got on the north—I got on the first car, the car that was supposed to be cut off." (Rec. 13.)

Thus it appears that the Circuit Court of Appeals has erroneously decided the case upon a false factual situation.

The plaintiff made five or six attempts to operate the pin lifter while riding on the car and three attempts while running along beside the car. The pin lifter failed to work, although the plaintiff said he had made every endeavor to operate it. It was not claimed upon the trial that the plaintiff was improperly positioned, or that he did not make a fair effort to operate the pin lifter. The Circuit Court of Appeals found that he was riding on the wrong car from which to operate the pin lifter. The fact is that plaintiff was on the other car. But that question was not raised. It makes no difference upon which car the switchman rides if he can reach the pin lifter and operate it.

Section 2 of Safety Appliance Acts.

This action is based upon Section 2 of the Safety Appliance Acts, which provides:

> "It shall be unlawful for any common carrier * * * to permit to be hauled or used * * * any car * * * not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." (45 U.S.C.A. 18.)

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The law applicable to this case is best stated in Roberts Federal Liabilities of Carriers, Vol. 2, Second Edition, p. 1213:

> "If the condition of a coupler is such that the knuckles cannot be opened with the use of the pin lifter and that either of them must be opened with the use of the hand, the coupler is defective within the meaning of the statute as it will not couple automatically by impact."

The purpose of the Safety Appliance Acts was to make it unlawful to use any car not equipped with automatic couplers whereby cars can be coupled and uncoupled without the necessity of men going between the ends of the cars. The duty is absolute and does not depend upon care exercised by the Railroad Company.

The section of the statute providing for couplers is remedial in nature, and is to be given a construction that will effectuate its purposes.

The test of compliance with the requirements of the statute is the operating efficiency of the appliances with which the cars are equipped. It is not necessary to prove a defect in the coupler, but evidence of the failure of a coupler to operate efficiently is sufficient to constitute proof of a violation.

In the case of *Myers* v. *Reading*, 331 U. S. 477, 91 Law Ed. 1615, the Court said:

> "Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance."

Judgment was affirmed in *Chicago, Rock Island & Pacific Railway Co.* v. *Brown*, 229 U. S. 317, where a similar

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factual condition existed. It appears from the case that it was the duty of the plaintiff, a switchman, to uncouple a car in a moving cut. The Court said (pp. 320, 321):

> "The uncoupling was to be done by means of shoving the cars in motion. Had the safety appliance been in order, this could have been accomplished by defendant in error while walking at the side of the train. But the safety appliance on the side of the car on which he was working at the time would not operate. He gave three or four jerks to it, which failed to open the coupler. He then reached in between the cars and attempted to lift the coupler with his fingers * * *. During all this time he was walking beside the cars, which were moving slowly * * *. As he was reaching for the coupler pin on this adjacent coupler, his foot slipped and a low brake beam, striking his foot, shoved him into an unblocked guard rail * * * and * * * this court settled that the failure of a coupler to work at any time sustains a charge of negligence in this respect, *no matter how slight the pull on the uncoupling lever.*" (Italics ours.)

In *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Popplar, Admr.*, 237 U. S. 369, 59 Law Ed. 1001, the action was brought to recover for the wrongful death of a brakeman resulting from an injury received by the decedent while attempting to uncouple a car which had been kicked to a siding. The Court said:

> "There was testimony that the decedent, on giving the stop signal, attempted to uncouple the 'head car' that was to be left to run of its own momentum on the siding; he tried repeatedly to do this by pulling the coupling pin with the lifter at the end of the next car, but without success, and then, stepping between the two cars, while they were moving at the rate of about 4 miles an hour, in order to effect the uncoupling by hand, he was run over and killed. The conductor, a witness for the company, who examined the coupling apparatus soon after the accident, testified that it worked with difficulty and that he would

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have reported it as a 'bad coupler' had it been brought to his attention. Without going into the evidence in detail, it is sufficient to say that we find no ground for reversal in the ruling that there was enough to go to the jury upon the question whether, in fact, the coupler was defective."

In the case of *St. Joseph & G. I. R. Co.* v. *Moore*, 243 U. S. 311, 61 Law Ed. 741, it appeared that the deceased was engaged in adjusting a defective automatic coupler on the rear end of the tender of an engine, which was started unexpectedly, causing him to be thrown from his feet by the steam hose equipment, which hung down to within a few inches of the surface of the track, whereby he was knocked down and run over, losing both hands. The action was based upon a violation of the Coupler Act. The Court said:

"The exercise of care, even the greatest, in supplying and repairing these appliances, will not excuse defects in them,—the duty and liability are absolute."

In the case of *Minneapolis & St. Paul R. R. Co.* v. *Gotschall, Admx.*, 244 U. S. 66, 61 Law Ed. 995, it appears that the deceased, the head brakeman on a freight train, was proceeding along the tops of the cars toward the locomotive when the train separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk, which threw the deceased from the train. The jury, under an instruction of the Court, was permitted to infer negligence from the fact that the coupler failed to perform its function.

The Court held that the principle of *res ipsa loquitur* applied in view of the positive duty imposed by the statute upon the Railroad to furnish safe appliances for the coupling of cars.

The rule was long ago laid down that the scope and effect

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of the Safety Appliance Acts are not now open to further discussion (*Chicago Burlington & Quincy Ry. Co.* v. *U. S.*, 220 U. S. 559).

Questions of Fact for Jury.

The Court assumed the position of jury. It attempted to weigh the evidence, and found that the plaintiff was negligent in the position he assumed.

The evidence clearly indicates that the coupler was defective in that it failed to operate after eight or nine attempts.

Even if the plaintiff had been guilty of contributory negligence, the Federal Acts provide that contributory negligence is not a defense to an action based upon a violation of the Federal Safety Appliance Acts. (Federal Safety Appliance Acts, 45 U. S. C. A. 610.)

There was no evidence from which it could be inferred that the plaintiff was in an improper position when he tried to operate the pin lifter. But even if he had been in an improper position, it had nothing to do with the happening of the accident because at the time he was injured he had gotten off the car and was running along the side when he stepped into the hole. No one contends that at the time he was injured he was improperly positioned.

In the case of *Ellis* v. *Union Pacific R. R. Co.*, 329 U. S. 649, the Court said:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

The decisions of the Supreme Court of the United States in recent years have made it clear that the jury is the arbiter of the facts in cases arising under the Federal

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Employers' Liability Act. The refusal of some courts to follow the clear mandate of the United States Supreme Court baffles explanation.

The Circuit Court of Appeals was wholly without right to review the weight of the evidence. The question before the Court was whether there was any evidence in the record supporting the verdict. The plaintiff testified that he made five or six attempts by using his utmost strength to raise the pin lifter while riding on the end of the car. After getting off of the car, and while running along the side, he made two or three other strenuous attempts to manipulate the pin lifter.

The observation in the Court's Opinion that the plaintiff was in an awkward position while he attempted to manipulate the pin lifter is an inference of the Court unsupported by evidence. But, even if it were true, it would be nothing more than contributory negligence, which, under the statute, would not be a bar to the plaintiff's claim.

The eagerness of some courts to overturn the verdicts of juries, especially in view of the recent opinions of the United States Supreme Court, seems incredible. In *Lavender* v. *Kurn*, 327 U. S. 654, 90 Law Ed. 916, the Court said:

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67, 68, 87 L. Ed. 610, 617, 618, 63 S. Ct. 444, 143 A.L.R. 967; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353, 354, 87 L. Ed. 1444, 1447, 1448, 63 S. Ct. 1062; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35, 88 L. Ed. 520, 525, 64 S. Ct. 409, 15 N.C.C.A. (N.S.) 647.

See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73."

The jury were the arbiters of the facts of the case, and the Circuit Court of Appeals acted beyond its power in substituting its opinion for that of the jury.

In the case of *Myers* v. *Reading*, 331 U. S. 477, 91 Law Ed. 1615, the Court said:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Conclusion.

We respectfully submit that there was ample evidence in the record supporting the plaintiff's judgment. The Circuit Court of Appeals went beyond its authority and decided against the plaintiff upon a controverted question of fact.

We pray that the judgment of the Circuit Court of Appeals may be reversed.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 19

ALFRED S. PENN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

RESPONDENT'S STATEMENT OF THE CASE.

Respondent's statement of facts is somewhat extended and is not entirely accurate. The facts appearing on the page citation of the record are so commingled with conclusions of the writer that it is quite impossible to identify either.

On pages 4 and 5 of petitioner's brief is an accurate account of the occurrence quoted verbatim from the record.

In this proceeding we are interested only in determining whether there is sufficient evidence in the record to sustain the verdict. It is immaterial that on three subsequent occasions the respondent obtained signed statements from the petitioner, or that the other members of the crew testified in some particulars at variance with the testimony of the plaintiff. Was there evidence that the coupler failed to work efficiently?

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ARGUMENT.

The main theme of defendant's argument seems to be based on *C. M. S. P. & P. R. Co.* v. *Linehan*, 66 Fed. (2d) 373 (1933), a case from the eighth circuit. There the Court said:

> "The question must be, was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition?"

The question posed is one of fact for the jury—not one of law for a reviewing court.

The court of appeals in this case held that the jury decided the case differently from the way the judges of that court would have decided it.

Respondent relies upon *Meisenhelder* v. *Bryam*, 182 Minn. 615 (1930), holding that the railroad company was not liable although the deceased had several times placed his foot against the pinlifter and it failed to work.

Respondent also relies upon *Western & Atlantic R. R. Co.* v. *Gentle*, 198 S.E. 257 (Ga. App. 1938), wherein it was held that a railroad company has complied with the Safety Appliance Statutes when it equips its cars with couplers *designed* to couple automatically upon impact, regardless of whether the coupler works efficiently or not.

In the case of *C. & O. Ry. Co.* v. *Charlton*, 247 Fed. 34 (1917), cited by respondent, it appears from the evidence that at the time of the accident the knuckles were closed but that the cars would have coupled automatically by impact if they had been open. It also appeared that there

was a pinlifter on the car by which the coupler might have been opened if it had been used.

The cases cited by respondent are of no assistance to this Court. Decisions of state courts construing the Safety Appliance Acts, while persuasive, are not binding upon the federal courts. All courts, including the Court of Appeals, are bound by the decisions of the United States Supreme Court. The applicable decisions of the United States Supreme Court construing a federal statute are binding on all courts.

Employment in train service on a railroad, even at best, is an extremely hazardous occupation. The purpose of the Coupler Act was to compel railroads to provide appliances which in some substantial degree would tend to make the occupation more safe.

The object of this section being remedial and humanitarian, it is not to be construed so narrowly as to defeat its purpose.

This Court has held on many occasions that the duty to provide safe couplers is absolute; it cannot be delegated, nor can the railroad company in any manner evade liability for damages for injuries resulting from a failure of a coupler to work efficiently. It is no excuse that the railroad company exercised reasonable care to comply with the law.

In the early days some courts were prone to limit the broad application of these laws as passed by Congress. For many years some courts persisted in whittling away the various rights granted by these laws. But in recent years the Supreme Court of the United States has restored these federal statutes to their proper standing. This court has decided that these Acts should be given a liberal construction, and that Congress intended that the jurors should be the arbiters of the facts.

Substantially all of the cases cited by respondent are

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cases where the courts have attempted to usurp the function of a jury, contrary to the recent decisions of this Court.

Respondent states in its brief (p. 16) that it has found no cases which hold that the purpose of Section 2 of the Act is to impose on carriers the absolute duty to furnish couplers which, regardless of the force exerted, or any other condition or circumstance, uncouple instantly on the first attempt.

That is not the question. In this case the injured employee made at least nine attempts to operate the pinlifter before it worked. The jury properly found the defendant guilty. It also answered a special interrogatory (Trans. 172) submitted by respondent to the effect that the coupler was defective. It was not within the province of the Court of Appeals to substitute its conclusions of fact for that of the jury. Although the position in which petitioner tried to operate the coupler may have been awkward it was not a condition of his own choosing. It was the railroad company that built and furnished the cars in that condition, and if the position required of the plaintiff in order to operate the coupler was awkward, it was the railroad's fault, and not the plaintiff's.

Change of Front.

The arguments of counsel for respondent are somewhat in conflict with statements made by him upon the trial of the case.

The Petitioner requested the giving of instruction "C" to the effect that a railroad has the duty not only to provide couplers coupling automatically by impact, but to keep them in such operative condition that they will always perform their function, and that the test of compliance is their operating efficiency (Trans. 158). Counsel for respondent objected to the giving of that instruction. The

following colloquy between the trial Judge and counsel for respondent occurred:

"By the Court: What do you say about the proof of the fact, if it be a fact, that the plaintiff tried unsuccessfully five times to uncouple the car by means of a lever? What do you say about the sufficiency of that proof?

• • • • •

"By Mr. Slater: If the evidence showed that the slack was in at the time, it would show a defect.

"By the Court: Don't worry about the slack. Forget the slack. Just assume that the slack was in and that the evidence showed that the plaintiff tried five times to uncouple the cars, would that show a defect in the coupler?

"By Mr. Slater: You would have to show what kind of force the man used himself.

"By the Court: Assume that he used sufficient force.

"By Mr. Slater: I would say if he tried and the slack was in, there would be a defect.

"By the Court: The slack was in and he tried with sufficient force to lift the handle, that would show a defect?

"By Mr. Slater: Yes." (Trans. 159.)

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ALLEGED ERRORS NOT CONSIDERED BY THE COURT OF APPEALS.

Respondent asks that the cause be remanded to the Court of Appeals in the event of a reversal.

Both of the questions which counsel alleges were not disposed of will necessarily be settled by this appeal.

The first question was the alleged error in refusing to grant defendant's motion to instruct the jury to find the defendant not guilty. If this Court decides this matter in favor of petitioner, the question of refusing to grant defendant's motion to instruct the jury is thereby disposed of.

The second point raised by respondent has to do with plaintiff's requested instruction "C" appearing on page 158 of the transcript. That instruction has to do with the duty of a railroad company to provide proper couplers and keep them in operative condition, and that the test of compliance is the operating efficiency of the couplers.

If this Court finds in favor of petitioner, the question of the giving of that instruction is thereby settled.

It would, therefore, seem proper, if the Court finds for petitioner, to reverse the judgment of the Court of Appeals without remandment.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Petitioner.

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vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

ANSWER OF PETITIONER TO RESPONDENT'S PETITION FOR REHEARING.

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Respondent.

ANSWER OF PETITIONER TO RESPONDENT'S PETITION FOR REHEARING.

The respondent has failed to comply with Rule 33 of the Rules of the Supreme Court of the United States which provides:

> "It must * * * be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay."

The petition ought to be stricken for failure to comply with the Rules.

It is possible that counsel for the respondent was unwilling to make the certificate necessary for jurisdiction.

In view of the reversal ordered by this Court, it is at

once apparent that no argument can be made against the validity of instruction E. Instruction E is as follows:

> "If you believe from a preponderance of the evidence that the coupler on the car in question was defective in that the same could not be uncoupled by means of the pinlifter, and that the plaintiff, at the time he was injured, was attempting to uncouple said coupler and was injured as a direct and proximate result of said alleged defective condition thereof, you should find the defendant not guilty." (Transcript, 164.)

This Court, in reversing the Court of Appeals, must necessarily have based its finding upon the proposition of law stated in this instruction.

In view of the finding entered by this Court, it would be impossible for the Court of Appeals to do otherwise than find the proposition of law stated in the instruction correct.

The Circuit Court of Appeals in its opinion made no reservations, and it must be presumed that its judgment was based upon all the contentions raised in that Court by petitioner.

We respectfully submit that respondent's petition for rehearing should be denied.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Petitioner.

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IN THE

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OCTOBER TERM, A. D. 1947.

No. [redacted] 19

ALFRED S. PENN,
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vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, A. D. 1947.

No. 600

ALFRED S. PENN,
Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Plaintiff Failed to Prove the Allegations of His Complaint.

At the time the case went to the jury, the complaint contained the single charge that defendant "carelessly, negligently and unlawfully equipped and maintained on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act."

The Act of Congress upon which this suit is based is found in Title 45 U. S. C. A., par. 2, *et seq.*, passed March 2, 1893. Section 2 of this act makes it unlawful for a railroad to haul or use in interstate commerce a car "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Respondent contends that there was no substantial evidence to sustain the charge in plaintiff's complaint, and that therefore the Circuit Court of Appeals properly reversed the judgment and remanded the cause with directions to grant defendant's motion for judgment in its favor notwithstanding the verdict.

The purpose of Section 2 of the Safety Appliance Act has frequently been stated by this Court, one such case being *St. L. & San Francisco R. R.* v. *Conarty*, 238 U. S. 243, where the Court said at page 250:

> "It is very plain that the evils against which these provisions (Safety Appliance Acts) are directed are those which attended the old-fashioned link and pin couplings, where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling."

Courts of review have uniformly held that before a coupler case may be said to present a jury question under the circumstances here involved, three things must be shown:

(a) that the coupler failed to work;

(b) that an honest and reasonable effort to operate the coupler was made by the injured employee; and

(c) that the effort was made at a time when the coupler reasonably could have been expected to operate, *i. e.* when the slack was bunched.

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Cases stating the foregoing proposition to be the law are:

Chicago M. St. P. & P. R. Co. v. *Linehan*, 66 F. 2d 373 (C. C. A. 8).

Meisenhelder v. *Bryam*, 233 N. W. 849 (Minn.).

Western & Atl. RR. v. *Gentle*, 198 S. E. 257 (Ga. A.).

Chesapeake & O. Ry. Co. v. *Charlton*, 247 Fed. 34 (C. C. A. 4).

Devaney v. *A. T. & S. F. Ry. Co.*, 27 P. 2d 635 (Calif.).

No cases have been found which hold that the purpose of Section 2 of the Act is to impose on carriers the absolute duty to furnish couplers which, regardless of force exerted or any other condition or circumstance, uncouple instantly on the first attempt to pull the pin.

On the trial plaintiff admitted that on the day of the accident he signed an accident report (defendant's exhibit 3), in which he described the occurrence as follows: "I was pulling pins and conductor gave a cut sign and train was going a little fast and I got off to pull a pin and I stepped in track 35 switch and caught my heel in between switch rod and tie and turned my left ankle." (Rec. 39, 181, 182). The report makes no complaint of the coupling device.

On July 28, 1944 plaintiff signed a typewritten version of the occurrence (defendant's exhibit 4), and wrote at the bottom thereof the words "I have read this statement and it is true." In this statement plaintiff said: "I just did not look where I was stepping and stepped in between the tie and bridle. I was not interfered with by anyone else or any other cars. There was nothing wrong with any of the equipment that had anything to do with this accident" (Rec. 39, 59).

On November 15, 1944, plaintiff signed another typewritten narrative of the occurrence and wrote a similar acknowledgment to the effect that he had read the statement and that it was true (Rec. 40, 60, 61). In the November 15 statement plaintiff said that the car involved was an "oldtimer" and that "the pin lifter was about 3½ feet from where I hung on the ladder. This is further away than usual and I could not pull it because I did not have sufficient leverage stretched out as I was to pull out and up on the pin and hang on at the same time. There was nothing wrong with the pin lifter, as soon as I got off I pulled it all right and it operated properly. I do not know what the car number was, but do know that the pin lifter operated all right when I got off and pulled it." Each of these three statements was admitted in evidence without objection (Rec. 58, 59, 60).

In the complaint filed in the U. S. District Court plaintiff said:

> "The coupler device was out of order and would not work, and the plaintiff stepped down to the ground and had taken *one or two steps* in order to otherwise uncouple said cars and thereupon stepped into an open space between the ties in said road bed, and thereupon plaintiff's foot and ankle were broken and injured." (Italics ours).

This case has been tried twice—the first trial resulting in a disagreement. On the first trial plaintiff testified that after he alighted he took *three* or *four* steps (not one or two as stated in the complaint), then pulled the pin *twice,* and on the second pull the pin worked properly (Rec. 36). On the second trial plaintiff testified that he boarded the freight car to avoid unnecessary exertion, because it was hot, and it got pretty tiresome running 15 or 20 feet every few minutes in order to pull pins (Rec. 14); that as he rode in the stirrup on

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the side of the car he was "stretched out in an awkward position" (Rec. 37); that he alighted because he thought he would have better leverage to operate the pin lifter if he was off the car (Rec. 38). Plaintiff further stated that when he stepped down from the stirrup he took three or four steps during which time he tried to operate the pin lifter *three* times (once more than on the first trial) and succeeded on the third attempt (Rec. 16). Counsel for petitioner has here brought the number of attempts up to *four* (petn. p. 2). At the time of plaintiff's attempts to operate the pin lifter, the train was going at a speed of six or eight miles an hour (Rec. 17). If the speed of the train was, in fact, eight miles an hour this would mean the train was moving approximately 12 feet a second. If it is assumed that plaintiff took three or four running steps beside the train (not just one or two as stated in the complaint) plaintiff must have moved along with the train a distance of about 12 feet, during an elapsed time of approximately one second. It thus appears that the essence of plaintiff's complaint is that after he got into a proper position to operate the pin lifter it took him as much as a second to pull the pin. If one second is too long, how much time may elapse in pulling a pin without violating the Safety Appliance Act? No more than half a second? No more than a quarter of a second? We have searched the authorities in vain in an effort to locate a case where liability under the Safety Appliance Act was imposed on a carrier solely because a few efforts were required before the employe successfully uncoupled the cars. In each case we have found which involved a situation where the carrier was held liable for failure to furnish a proper coupler, either the coupler itself broke or the injured employe was wholly unable to effect an uncoupling by the use of the pin lifter.

We call attention to the fact that plaintiff's own testimony conclusively proves that the cars were uncoupled by the use of the pin lifter, and "without necessity of men going between the ends of the cars". Consequently, the charge in plaintiff's complaint that defendant unlawfully maintained a defective coupler "in that the same *could not be uncoupled* by means of the pin lifter" remains unproven. The rule that in Federal courts a plaintiff can recover only on the allegations of his pleadings and cannot recover on some other act appearing in the proof, is so well settled that it is necessary to cite only two of many such cases: *Southern Ry. Co.* v. *Montgomery*, 46 F. 2d 990 (C. C. A. 5) and *Sheffield* v. *Cantwell*, 101 F. 2d 351 (C. C. A. 7).

The basis for the petition for writ of *certiorari* filed herein is that "the Circuit Court of Appeals has erroneously decided the case upon a false factual situation", because the court erroneously found that plaintiff mounted the car next to the one to be uncoupled; that in truth plaintiff rode the car that was supposed to be cut off (petn. 5). The alleged error of the Circuit Court of Appeals in placing petitioner on the car next to the one to be cut off, rather than on the car to be cut off, is described as "egregious" (petn. 7).

In the first place, on page 4 of appellee's brief filed in this case in the United States Circuit Court of Appeals, counsel for petitioner herein said: "At the time of the accident the defendant intended to shunt a certain car onto a switch track, and to do so the *plaintiff stood upon the stirrup on the car next to the head car* in order that he might uncouple the car when it had attained sufficient momentum to carry it to its destination." (Italics ours).

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In the second place, it is perfectly clear that the opinion of the Circuit Court of Appeals is not based on which car plaintiff was riding, but is founded on the proposition that the evidence was insufficient to prove a coupler defect within the meaning of the Safety Appliance Act. As the Circuit Court of Appeals pointed out, it is plain that petitioner was not in a proper position to operate the coupler. Whether plaintiff's awkward position was caused by his riding on one car or the other is immaterial. Recognizing the fact that he was in an unhandy position, plaintiff stepped to the ground for the purpose of performing the operation. The fact that the pin did not lift while plaintiff was awkardly positioned, but did lift when petitioner got to a place where he could make an honest and reasonable effort, dispels any inference of coupler defect which might possibly arise. Plaintiff's testimony on the trial that when he first pulled the pin it should have come but didn't (Rec. 16) is nothing but an unsupported opinion on an ultimate issue and is without any probative force. As stated by the text in "Opinion Evidence in Illinois" by King & Pillinger at page 320:

> "In cases other than sanity and land value cases, the courts have frequently referred to 'naked opinions' or 'unsupported opinions' on ultimate issues as without any probative force (citing cases)."

We respectfully submit that the only way in which a recovery can be allowed in this case is to treat the Federal Employers' Liability Act as one which imposes upon carriers liability without deficiency or fault. Such imposition of liability, however, is utterly inconsistent with the fact that up to the present time Congress has seen fit to have liability for injuries by railroad employes based solely on proof of fault, and that it is not for the court to torture and twist this Act of Congress so as to make it become a law not of liability for fault but liability for injuries.

On page 10 petitioner cites the case of *Myers* v. *Reading Co.*, 331 U. S. 477. That case does not involve a coupling device. It involves an entirely different statute from the one here under consideration. The question before the court in the *Myers* case was whether the hand brake upon which plaintiff was working when injured complied with the provision of the statute that "all cars must be equipped with secure sill steps and *efficient* hand brakes". This court held that it was a question of fact for the jury to decide whether the hand brake which unexpectedly spun around was an "efficient one within the meaning of the statutory requirement". We fail to see how the statute involved in the *Myers* case has any bearing on the section involved in the case at bar. Counsel's reference to the *Myers* case indicates that he has become confused as to which act applies, possibly because of the fact that two sections of the Safety Appliance Acts are numbered "2". The first "Section 2", and the one involved in the instant case, is contained in Title 45 U. S. C. A., paragraph 2, and is part of the Act of Congress passed March 2, 1893. The other "Section 2", and the one involved in the *Myers* case, is contained in Title 45 U. S. C. A., paragraph 11, and is part of the Act of Congress passed April 14, 1910. Obviously, these two acts are wholly independent. The fact that the word "efficient" is used in the hand brake section does not mean that the same standard is required in the coupler section.

On page 10 of the petition, counsel makes the amazing suggestion that even if he failed to adduce substantial evidence to support the complaint, a new trial, nevertheless, should be awarded "in order to allow the plaintiff to produce other sufficient evidence of the defectiveness of the pin lifter." *Stewart* v. *Southern Ry.*, 315 U. S. 283, is cited in support of the proposition that a

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new trial should be granted for the purpose of permitting the introduction of further evidence. There is no merit whatsoever to counsel's suggestion. Plaintiff made no complaint about the coupler and consequently defendant's car inspectors did not examine this car. Actually, defendant's conductor, Wescott, testified he used the pin lifter soon after the occurrence and the coupler functioned properly (Rec. 82). We know of no further evidence which could be adduced on the subject of the operation of the coupler. Counsel for plaintiff suggests none. All agree that the car *was* uncoupled by the use of the pin lifter.

II.

In the Present State of the Record, There Is No Basis for Reversing the Circuit Court of Appeals and Affirming the Judgment for Plaintiff.

On defendant's appeal from the District Court to the Circuit Court of Appeals, two propositions of law were relied on:

(1) The court erred in refusing to grant defendant's motion to instruct the jury to find defendant not guilty; and

(2) The court erred in giving to the jury plaintiff's instruction E.

It is so stated in the third paragraph of the opinion of the Circuit Court of Appeals. Because the Circuit Court of Appeals concluded that there was no substantial evidence to sustain the verdict, and for that reason remanded with directions to enter a judgent notwithstanding the verdict, it was not necessary for the Circuit Court of Appeals to pass on the errors complained of in instruction E. Manifestly, therefore, there is no ground for reinstating the District Court judgment.

III.

This Is Not the Type of Case Which Should Be Taken By the Supreme Court of the United States.

As noted above, plaintiff bases his petition to this court on the contention that the Circuit Court of Appeals has erroneously decided the case upon a "false factual situation" (petn. 5).

We respectfully submit that the policy of this court should be to abstain from taking a case, even though it might have been erroneously decided below, if the decision does not involve an important question of law, does not create a diversity of decisions in the lower courts, or does not seriously affect the administration of law in other cases. This should be true, particularly where, as here, the decision below recognizes the controlling legal principles but is claimed to have applied them improperly to the specific facts disclosed. We submit that it is irrelevant to the exercise of the power of review of this court that if it had been charged with the responsibility of a trial judge or a member of the court below, it might have held the case one for submission to a jury. In the instant case there have been two jury trials and one hearing in a reviewing court. Plaintiff's injuries resulting from the occurrence in question (fractures of the left ankle) were not permanently disabling, and he was able to return to work a few months after the accident. He worked at various jobs up until the time of the first trial, but then abstained from work. Motion pictures introduced in evidence showed that petitioner was able to walk without any visible limp and do tasks which involved considerable strain and effort (Rec. 133). If in such a case as this the Supreme Court of the United States accords a third hearing, this court will have little time or opportunity to do anything else

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but examine the claims of plaintiffs and defendants, that, in the special circumstances disclosed, prejudicial errors have been committed. It is our contention that there is no reason why a preference should be given to actions brought under the Federal Employers' Liability Act over those founded on other Federal statutes.

The granting of the petition for *certiorari* in this case would undoubtedly be an additional reason for lower court judges to avoid reversals by arbitrarily deciding for plaintiffs in Federal Employers' Liability Act cases, confident that such decisions are not likely to be reviewed in this court.

We submit that on the law and the facts the Circuit Court of Appeals has correctly decided this case. There is nothing to be gained by reviewing alleged errors which at most present questions of fact. Accordingly the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

LOWELL HASTINGS,
DRENNAN J. SLATER,
Attorneys for Respondent.

DRENNAN J. SLATER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948.

No. 19

ALFRED S. PENN,
Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Respondent.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

This suit is brought under the Federal Employers' Liability Act, based on an alleged violation of the Federal Safety Appliance Act, 45 U.S.C.A., paragraph 2, to recover damages for injuries sustained by plaintiff while working as a switchman for defendant.

The accident occurred in defendant's Yard 8 at Proviso, Illinois. At this location defendant's yard tracks run east and west and branch off from a lead track which

runs northwest and southeast. The accident happened about noon on July 27, 1944, a clear, sunny day. At the time in question the crew with which Penn worked was engaged in switching out a cut of cars from the lead track on to various yard tracks. The engine was headed west and was at the west end of about 20 cars. The engineer was thus on the north side of the train. The switch crew worked on the engineer's side (Rec. 11). It was Penn's duty to cut off cars according to directions marked in chalk on the side of the cars, and he accomplished the uncoupling by means of a pin lifter. Plaintiff testified that shortly before the accident the train was standing still; that on the first or most easterly car he saw a chalk mark which said "one car", thereby meaning that the lead car was to be cut off; that Conductor Wescott, who was stationed 500 or 600 feet east of where Penn stood, gave a kick signal, and within 20 or 30 seconds thereafter the train moved to the east; that at about the time the train started Penn stepped on the stirrup on the northwest corner of the lead car (Rec. 13). Penn testified that he stepped on the car in question at a point about 50 or 60 feet west of switch No. 35 (Rec. 30). He boarded this car because it was a hot day and running 15 or 20 feet alongside the moving train every few minutes to pull pins became pretty tiresome (Rec. 14). Located at the northwest corner of the lead car was the pin lifter. This is a rod about 4½ feet long, with the outside end bent to form a handle. The inside end of the rod was fastened to a link which, in turn, was connected with the coupler pin (Rec. 14). The coupler was of standard make. It is agreed that freight cars cannot be and are not intended to be uncoupled unless the slack in the couplers is "in" or bunched (Rec. 15). When the slack is in the pin may be lifted by pulling up on the handle at the end of the pin lifter rod

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and by so doing the knuckles of the couplers are opened, thus permitting the cars to part (Rec. 15). Penn stated that he got on the lead car while the train was standing still. At that time he could not tell whether the slack was in or out, and he admits that it might have been either way (Rec. 32). Of course, if the slack had been out at the time he boarded the car it would have been impossible for him to have pulled the pin. Penn stated that with the first move to the east the slack might have run out (thereby preventing the pin from being pulled) (Rec. 34). With the next impact (2 or 3 seconds later) the slack came in again (Rec. 35). Penn says that as he stood on the stirrup at the side of the car he was stretched out in an awkward position, his left hand being on a rung of the ladder on the side of the car and his right hand stretching out to grasp the handle of the pin lifter (Rec. 37); that after the train had moved a short distance toward the east and the slack had once more come back in, he made 5 or 6 efforts to pull up on the handle (Rec. 15). . Due to the position in which he stood, plaintiff was unable to get any leverage on the pin (Rec. 38). Finding that 5 or 6 efforts to operate the pin from the side of the car were unavailing because proper leverage could not be obtained, Penn stepped to the ground where he would have proper leverage (Rec. 38). When plaintiff alighted, the train was going from 6 to 8 miles an hour (Rec. 35). He ran 3 or 4 steps during which time he gave three hard pulls on the pin (Rec. 35). He says that on the third pull the pin lifter operated properly, the pin came up, the knuckles opened and the lead car was cut off (Rec. 37). In the process of running the 3 or 4 steps, plaintiff's left foot was caught in the space between the rod and ties at No. 35 switch. A fracture in the left ankle resulted (Rec. 59, 112).

Following the accident plaintiff made no verbal complaint about the pin lifter not working (Rec. 77). On the same day as the accident occurred, plaintiff signed a report (Defendant's Exhibit 3) in which he described the occurrence as follows: "I was pulling pins and conductor give a cut sign and train was going a little fast and I got off to pull a pin and I stepped in Track 35 switch and caught my heel in between switch rod and tie and turned my left ankle" (Rec. 39, 181, 182). The report makes no complaint of the coupling device.

On July 28, 1944, plaintiff signed a typewritten narrative form version of the occurrence (Defendant's Exhibit 4). Immediately above his signature he wrote the words "I have read this statement and it is true." The incident is thus described: "I just did not look where I was stepping and stepped in between the tie and bridle. I was not interfered with by any one else or any other cars. There was nothing wrong with any of the equipment that had anything to do with this accident" (Rec. 39, 59).

On November 15, 1944, plaintiff signed another typewritten narrative form statement of the occurrence and wrote a similar acknowledgment to the effect that he had read the statement and that it was true (Rec. 40, 60, 61). In the November 15 statement plaintiff said the car involved was an "old timer" and that "the pin lifter was about 3½ feet from where I hung on the ladder. This is further away than usual and I could not pull it because I did not have sufficient leverage stretched out as I was to pull out and up on the pin and hang on at the same time. There was nothing wrong with the pin lifter, as soon as I got off I pulled it all right and it operated properly. I do not know what the car number was, but I do know that the pin lifter operated all right when I got off and pulled it." Each of these

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three written statements was admitted in evidence without objection (Rec. 58, 59, 60) and no contention is made that plaintiff was imposed on in any way when he signed any of these statements.

On plaintiff's case the only occurrence testimony was that given by Penn himself. On defendant's case, conductor Wescott and engineer Fairchild testified as occurrence witnesses (Rec. 77, 124). Wescott stated that at the time Penn tried to cut off the leading car, plaintiff was at all times on the ground and that he never reached the pin but stepped in the switch stand space on his way to the side of the car (Rec. 79). Wescott stated that after the accident he operated the pin lifter and that it then worked properly (Rec. 80). Engineer Fairchild stated that the train had not come to a stop just before the car in question was kicked down the track; that the train was permitted to drift slowly ahead from one kick until the next; that he saw Penn come toward the cars and saw him stumble and fall on his way to the first car; that he did not see him try to get the pin or have any trouble in pulling it (Rec. 126).

At the close of all the evidence defendant moved for a directed verdict in its favor (Rec. 6). This motion was denied by the court (Rec. 6, 149). Thereafter, the jury returned its verdict, finding defendant guilty and assessing plaintiff's damages in the sum of $15,000 (Rec. 190). Judgment was thereupon entered on the verdict. Within the time permitted, defendant filed its motion for judgment notwithstanding the verdict and, in the alternative, for a new trial or for a remittitur. The trial court overruled each of these motions, and thereafter defendant appealed to the Circuit Court of Appeals.

In its opinion reported in 163 F. 2d 995, the Circuit Court of Appeals held that the evidence was insufficient to take the case to the jury; that the pin was lifted and

the cars were uncoupled, so that evidence did not prove the allegations of the complaint that the coupler was defective "in that the same could not be uncoupled by means of the pin lifter". The Court of Appeals reversed the judgment and remanded the case to the trial court with directions to grant defendant's motion for judgment in its favor notwithstanding the verdict. In reaching its conclusion the Court of Appeals reasoned that the undisputed evidence showed that plaintiff was not in such position that he could operate the coupler while he was stationed on the side of the car; that plaintiff recognized that this was the case and placed himself on the ground so that he could make a reasonable effort to operate the pin lifter; that although plaintiff stated that while on the ground he made three attempts to lift the pin before he succeeded, it is evident that the coupler operated within a second or two after plaintiff had put himself in a position where he could use sufficient force; that the fact the coupler did not operate while plaintiff was awkwardly positioned on the car is not proof of a defect and that the fact that the coupler operated so readily after plaintiff was in a position where he could get leverage dispelled any inference of a defect which might have arisen from plaintiff's previous unsuccessful efforts. In view of the conclusion of the Circuit Court of Appeals that the judgment notwithstanding the verdict was proper, it became unnecessary for that court to rule on defendant's further contention that the trial court erred in instructing the jury.

Plaintiff's petition for certiorari having been granted by this court, the case is now here on the sole proposition of whether there was any substantial evidence in the record to sustain plaintiff's complaint. The question of error in the instructions given the jury by the court on behalf of plaintiff is not now presented to this court.

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PROPOSITIONS OF LAW RELIED ON.

I.

The Circuit Court of Appeals Properly Concluded There Was No Substantial Evidence to Prove That Defendant Used a Coupler Which Failed to Comply With the Safety Appliance Act.

St. L. & San Fran. R. R. v. *Conarty*, 238 U. S. 243, 250;

Chicago M. St. P. & P. R. Co. v. *Linehan*, 66 F. 2d 373 (C.C.A. 8);

Meisenhelder v. Byram, 182 Minn. 615, 233 N. W. 849;

Western & Atl. R. R. v. *Gentle*, 198 S. E. 257 (Ga. A.);

Chesapeake & O. Ry. Co. v. *Charlton*, 247 F. 34 (C.C.A. 4);

Devaney v. *A. T. & S. F. Ry. Co.*, 219 Calif. 487, 27 P. 2d 635;

Pennsylvania R. Co. v. *Jones*, 300 F. 525 (C.C. A. 6);

Southern Ry. Co. v. *Montgomery*, 46 F. 2d 990 (C.C.A. 5);

Sheffield v. *Cantwell*, 101 F. 2d 351 (C.C.A.7);

"Opinion Evidence in Illinois" by King & Pillinger, p. 330:

Bramwell v. *U. S. Fidelity Co.*, 269 U. S. 483, 489;

San Antonio Ry. v. *Wagner*, 241 U. S. 476.

II.

Where There Is No Substantial Evidence to Prove Plaintiff's Case the Trial Court Should Direct a Verdict for Defendant.

Brady v. *So. Ry. Co.*, 320 U. S. 476, 479;

Myers v. *Reading Co.*, 331 U. S. 477, 485.

III.

Errors of Law Not Argued Because Not Considered By Circuit Court of Appeals.

Aetna Casualty & Surety Co. v. *Flowers*, 330 U. S. 464.

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ARGUMENT.

I.

The Circuit Court of Appeals Properly Concluded There Was No Substantial Evidence to Prove That Defendant Used a Coupler Which Failed to Comply With the Safety Appliance Act.

At the time the case went to the jury, the complaint contained the single charge that defendant "carelessly, negligently and unlawfully equipped and maintained on said car a defective coupler in that the same could not be uncoupled by means of the pin lifter, contrary to the provisions of the Federal Safety Appliance Act" (Rec. 3, 149).

The Act of Congress upon which this suit is based is found in Title 45 U.S.C.A., par. 1, *et seq.*, passed March 2, 1893. Section 2 of this act makes it unlawful for a railroad to haul or use in interstate commerce a car "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Respondent contends that there was no substantial evidence to sustain the charge in plaintiff's complaint, and that therefore the Circuit Court of Appeals properly reversed the judgment and remanded the cause with directions to grant defendant's motion for judgment in its favor, notwithstanding the verdict.

The purpose of Section 2 of the Safety Appliance Act of March 2, 1893, has been described in *St. L. & San Fran-*

cisco R. R. v. *Conarty*, 238 U. S. 243, as follows (page 250):

> "It is very plain that the evils against which these provisions (Safety Appliance Acts) are directed are those which attended the old-fashioned link and pin couplings, where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling."

Courts of review have uniformly held that before a coupler case may be said to present a jury question under the circumstances here involved, two things must be shown:

(a) that an honest and reasonable effort to operate the coupler was made by the injured employee at a time when the coupler reasonably could have been expected to operate, *i. e.* when the slack was bunched.

(b) that the coupler failed to work.

In *Chicago M. St. P. & P. R. Co.* v. *Linehan*, 66 F. 2d 373 (C. C. A. 8), the court said:

> "If plaintiff failed to operate the coupler in a proper manner, the fact of its not working would be no evidence of defect. Just how much force may be necessary in operating the pin lever in order to bring about an opening of the knuckle cannot be definitely stated. There is no accurate measuring stick. One pull of the lever might be sufficient if enough force were put behind it, and there might be as much force exerted in one pull as in two or three. The question must be, Was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition?"

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Another case holding that the mere failure of a coupler to operate does not in and of itself constitute a violation of the Safety Appliance Act is *Meisenhelder* v. *Bryam*, 182 Minn. 615, 233 N. W. 849. There a suit was brought to recover damages for the death of plaintiff's intestate who was employed by defendant as a brakeman. Judgment for defendant was entered in the trial court, and on appeal the Supreme Court of Minnesota affirmed. The complaint was based on both the F.E.L.A. and the Safety Appliance Act. The fatal accident occurred while an engine and three cars were being backed on a side track. During this process the coupling between the second and third cars opened and the third car separated from the others, so that a space of a few feet was left. Deceased went in between the two cars which had separated, and when he did so he was caught and crushed between the couplers. The evidence in support of the alleged violation of the Safety Appliance Act was that while the cars were moving, deceased rode in the stirrup of one of the cars and several times pressed his foot against the pin lifter without effect. The court held that failure of the pin lifter to operate under these conditions was not determinative, for the reason that, if the slack was out when deceased tried to pull the pin, the pin lifter would not have lifted and was not intended to lift the pin. In the *Meisenhelder* case there was also evidence that after the accident the cars did not automatically couple on the first attempt, but the court observed that this was not an unusual occurrence; that when a test of the couplers was made following the accident in all probability one or both of the knuckles had been partly closed or had moved, thus preventing an automatic coupling; that against any inference that the coupler was defective was the undisputed evidence that there was no mechanical defect in it. The court said at page 850:

"That a coupler fails to operate by use of the pin lifter under proper conditions, is some evidence of a defective condition. But we fail to find any evidence reasonably showing that this coupler or pin lifter so failed. The evidence was insufficient, as a matter of law, to justify any recovery on the ground of an alleged defective coupler appliance."

In *Western & Atl. R. R.* v. *Gentle*, 198 S. E. 257 (Ga. A.) the court reversed a judgment for plaintiff, based on an alleged violation of the Safety Appliance Act, and said on pages 262 and 263:

"The failure of couplers to couple is not *per se* a violation of the act. That, on a given occasion, couplers failed to couple upon impact, does not disrobe them of their character of 'couplers coupling automatically upon impact,' as we construe those terms to be used in this act. By the use of the above term, we do not apprehend that it was the intention of Congress to require railroads to equip their cars with couplers designed to couple automatically upon impact, without the necessity of men going between the ends of the cars, which would, upon all occasions and under all circumstances, actually couple, without fail, upon impact. The railroad has complied with the law when it equips its cars with couplers designed to couple automatically upon impact without the necessity of men going between the ends of the cars, which couplers are of general use among well-regulated railroads, and unless the failure of the couplers to couple on a given occasion results from some defect therein, the railroad cannot be held responsible for injuries resulting proximately therefrom. We think that this is apparent from the mass of adjudications under this section.

To give the act any other construction would result in absurdities, plainly not within the contemplation of Congress in the passage of this act."

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"In many of the adjudicated cases we find it stated that 'the failure of a coupler to work at any time sustains a charge that the Act has been violated.' See *Philadelphia & R. R. Co.* v. *Auchenbach*, 3 Cir. 16 F. 2d 550, 552, and citations. We seriously question the general applicability of this rule to all cases especially to a case of the present character where it appears, from all the evidence, that inferences other than that the couplers were defective are authorized from their failure to couple upon first impact. In no case called to our attention by the very exhaustive and able briefs filed by counsel for both parties, or any that our research has revealed, has it been expressly ruled that the mere showing that upon one occasion couplers did actually fail to couple, authorized a finding that the couplers were defective though it may be inferable therefrom that such be the case. Each of the cases examined, and we have diligently tried to examine all of them, presents a stronger state of facts than those above stated."

Another case holding that a carrier does not become liable for failure of a coupler to operate under any and all circumstances is *Chesapeake & O. Ry. Co.* v. *Charlton*, 247 F. 34, (C.C.A. 4). In that case defendant's brakeman was fatally injured when he went between two freight cars in order to open the knuckle on one of the draw bars, and the cars then came together without warning. The evidence showed that at the time of the accident the knuckles were closed but that if the knuckles had been opened the cars would have coupled automatically. The evidence also showed that it was possible to open the knuckles by lever without going between the cars. The question was clearly presented to the court whether, under the Safety Appliance Act, it was the duty of the carrier not only to equip its cars with appliances that would automatically couple by impact, but also to have the couplers so constructed that

the knuckles would be open at all times so as to permit the coupling to be made without operating the lever extending outside the car. The court held that there was no such absolute duty as stated in the latter proposition; that to so construe the statute would be to require railroads to perform a duty which was impractical. The court stated on page 40:

> "The framers of the act only intended to require the railroads to furnish some kind of an appliance that would automatically couple cars and uncouple the same without exposing employes to the risks that were incident to coupling and uncoupling cars before the date of the passage of the act. The railroads, we think, have fully met this requirement by equipping their cars with an appliance that couples automatically by impact, and so arranged that if the knuckles should, for any reason, become closed that the same could be opened by using the lever at the side of the car, and thereby accomplished the obvious purpose of the statute, *viz.* to have the railroad so construct their couplers that it would be possible to couple and uncouple cars without going between them."

The court in the *Charlton* case, therefore, reversed without remanding.

An excellent review of the various coupler cases arising under the Safety Appliance Act is contained in an opinion of the Supreme Court of California in *Devaney* v. *A. T. & S. F. Ry. Co.*, 219 Calif. 487, 27 P. 2d 635. In that case the court held that there was no absolute liability shown on the railroad merely because the coupler failed to uncouple. The leading cases, including *Minneapolis & St. P. R. R. Co.* v. *Gotschall*, 244 U. S. 66, are reviewed in detail and reconciled. On page 638 of the opinion the court states that the question in each of the reported cases involving the Safety Appliance

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Act where the verdict or judgment was for the plaintiff was whether, under the particular facts, the trier of the facts was entitled to find that the device was defective. In none of the reported cases was the carrier held liable where the effort to couple or uncouple was not made under ordinary conditions or at a time when the coupler was not expected to operate; that in a situation such as that presented in the *Gotschall* case, where the train broke in two, it was obvious that the happening of such an unusual occurrence was sufficient to uphold a finding that a defect existed.

In *Pennsylvania R. Co.* v. *Jones*, 300 F. 525 (C.C.A. 6) plaintiff brought suit against defendant railroad to recover damages on account of injuries sustained by him while working as a brakeman. The basis of the suit was defendant's use of a coupling device which could not be operated in uncoupling without the necessity of going between the cars, and the provisions of the Safety Appliance Act were invoked. Plaintiff in the *Jones* case rode on a stirrup of one of the freight cars and pushed down with his foot against the pin lifter several times without succeeding in operating the pin. Plaintiff then decided that he could get a better result if he assumed another position, and accordingly shifted his body so that he could put his whole weight on the pin lifter. This time the pin lifted and the cars uncoupled, but at about the time they uncoupled there was a violent jerk of the train and plaintiff was thrown to the ground and injured. The court held that the fact that the pin did not work might be sufficient evidence of an existing defect "if it also appears that the effort was of a character and made at a time when it would have naturally been effective save for a defect"; but the court also observed that because of the refusal of the trial judge

to give one of defendant's requested instructions it was not necessary to decide the legal point of whether two unsuccessful attempts, followed by a third and successful attempt showed a violation of the Safety Appliance Act. The refused instruction which was held sufficient to warrant a reversal was one tendered by defendant, which told the jury that if plaintiff's inability to operate the lever on the first attempt was because of the friction between the coupler and the pin or because of the position of the two freight cars in relation to each other, and not because of any defect in the coupling apparatus, such failure to operate from that cause would not show a violation of the Safety Appliance Act. In the *Jones* case plaintiff argued that the refusal to give the instruction was not error because there was no evidence that the failure to work was because of the condition of the slack. The court stated, however, that it could not accept this suggestion, because plaintiff's own testimony tended to show that while a train was being pushed by an engine there would be friction on the coupler pin and also that while slack was out the pin could not be pulled because of friction; that perhaps there was no friction on the pin for either reason, but that the court could not assume something not shown by the record, in order to decide that there was no prejudice from the erroneous instruction. Accordingly, a new trial was ordered.

No cases have been found which hold that the purpose of Section 2 of the Act is to impose on carriers the absolute duty to furnish couplers which, regardless of force exerted or any other condition or circumstance, uncouple instantly on the first attempt to pull the pin. At the time of plaintiff's attempts to operate the pin lifter in the instant case, the train was going at a speed of six or eight miles an hour (Rec. 17). If the speed

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of the train was, in fact, eight miles an hour this would mean the train was moving approximately 12 feet a second. If it is assumed that plaintiff took three running steps beside the train and not just one or two as stated in the complaint (Rec. 2), plaintiff must have moved along with the train a distance of about 12 feet, during an elapsed time of approximately one second. It thus appears that the essence of plaintiff's complaint is that after he got into a proper position to operate the pin lifter it took him as much as a second to pull the pin. If one second is too long, how much time may elapse in pulling a pin without violating the Safety Appliance Act? No more than half a second? No more than a quarter of a second? In each reported case we have found which involved a situation where the carrier was held liable for failure to furnish a proper coupler, either the coupler itself broke or the injured employe was wholly unable to effect an uncoupling by the use of the pin lifter.

We call attention to the fact that plaintiff's own testimony conclusively proves that the cars were uncoupled by the use of the pin lifter, and "without necessity of men going between the ends of the cars". Consequently, the charge in plaintiff's complaint that defendant unlawfully maintained a defective coupler "in that the same *could not be uncoupled* by means of the pin lifter" remains unproven. The rule that in Federal courts a plaintiff can recover only on the allegations of his pleadings and cannot recover on some other act appearing in the proof, is so well settled that it is necessary to cite only two of many such cases: *Southern Ry. Co.* v. *Montgomery*, 46 F. 2d 990 (C.C.A. 5) and *Sheffield* v. *Cantwell*, 101 F. 2d 351 (C.C.A. 7).

Petitioner complains that "the Circuit Court of Appeals has erroneously decided the case upon a false

factual situation", in that the Court of Appeals has erroneously found that plaintiff mounted the car next to the one to be uncoupled; that in truth plaintiff rode the car that was supposed to be cut off (Br. p. 7). Accordingly, the error of the Court of Appeals complained of is in stating that petitioner was on the car next to the one to be cut off, rather than on the car to be cut off.

It is perfectly clear that the opinion of the Court of Appeals is not based on the matter of which car plaintiff was riding, but is founded on the proposition that the evidence was insufficient to prove that the coupler failed to comply with the requirements of the Safety Appliance Act. As the Circuit Court of Appeals pointed out, it is plain that petitioner was not in a position where he could properly operate the coupler. Whether plaintiff's awkward position was caused by his riding on one car or the other is immaterial. Recognizing the fact that he was in an awkward position, plaintiff stepped to the ground to get the necessary leverage (Rec. 38). The fact that the pin did not lift while plaintiff was awkwardly positioned, but did lift when petitioner got to a place where he could make an honest and reasonable effort, dispels any inference of coupler defect which might possibly arise. Since plaintiff produced no expert testimony to enlighten the jury on the proper method of operation of a pin lifter, there is nothing in the record to indicate that several preliminary attempts to lift the lever were anything out of the ordinary. Apparently it was the usual thing to have to run 15 or 20 feet alongside the moving train for it was to avoid the "tiresomeness" of taking these steps that plaintiff boarded the train just before the accident (Rec. 14).

Plaintiff's testimony that when he first pulled the pin it should have come but did not (Rec. 16), is nothing but an

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unsupported opinion on an ultimate issue and is without any probative force. As stated by the text in "Opinion Evidence in Illinois" by King & Pillinger at page 320:

> "In cases other than sanity and land value cases, the courts have frequently referred to 'naked opinions' or 'unsupported opinions' on ultimate issues as without any probative force (citing cases)."

On pages 8 to 11 of petitioner's brief, six Supreme Court of the United States cases are cited as being in support of plaintiff's position. A careful examination of each of these cases shows that not one of them involved a similar factual situation. Counsel for plaintiff has quoted passages from some of these cases in an effort to bolster his position. It is well settled that a judicial opinion, like a judgment, must be read as applicable only to the facts involved and is authority only for what is actually decided. *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483, 489..

On page 8 of his brief petitioner cites the case of *Myers* v. *Reading Co.*, 331 U. S. 477, but that case involves an entirely different statute from the one here under consideration. The question before the court in the *Myers* case was whether the hand brake upon which plaintiff was working when injured complied with the provisions of the statute that "all cars must be equipped with secure sill steps and *efficient* hand brakes". This court held that it was a question of fact for the jury to decide whether the hand brake which unexpectedly spun around was an "efficient one within the meaning of the statutory requirement". We fail to see how the statute involved in the *Myers* case has any bearing on the section involved in the case at bar. Counsel's quotation from the *Myers* case is somewhat misleading in that he has failed to indicate that the language set out is actually part of this court's quotation from *Spotts*

v. *B. & O. R. Co.*, 102 F. 2d 160, 162. That case, like the *Myers* case, is concerned solely with the operation of a handbrake, not a coupler. Neither this court in the *Myers* case nor the Circuit Court of Appeals in the *Spotts* case had before it the question of what constituted proper operation of a coupler. It is to be noted that there are two sections of the Safety Appliance acts which are numbered "2". The first "Section 2", and the one involved in the instant case, is contained in Title 45 U.S.C.A., paragraph 2, and is part of the Act of Congress passed March 2, 1893. The other "Section 2", and the one involved in the *Myers* case, is contained in Title 45 U.S.C.A., paragraph 11, and is part of the Act of Congress passed April 14, 1910. Obviously, these two acts are wholly independent. The fact that the word "efficient" is used in the hand brake section does not mean that the same standard is required in the coupler section.

The next case relied on by plaintiff is *Chicago, R. I. & Pac. Ry. Co.* v. *Brown*, 229 U. S. 317. Counsel has distorted the sense of his quotation from that case by the simple expedient of omitting some of the words of the opinion. Counsel gives the impression that this court there held that "the failure of a coupler to work at any time sustains a charge of negligence in this respect, *no matter how slight the pull on the uncoupling lever*" (italics as applied by counsel for plaintiff). What this court actually said in the *Brown* case was that counsel for the railroad had conceded that two earlier cases decided by this court had held that the failure of a coupler to work at any time proved negligence, "no matter how slight the pull on the coupling lever." In the *Brown* case the court itself did not hold that counsel's concession was the law. Three years after the *Brown* case was decided, this court expressly pointed out in *San Antonio*

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Ry. v. *Wagner*, 241 U. S. 476, that it did not hold in the *Brown* opinion that counsel's concession there was the law. On page 484 of the *Wagner* case this court said "We need not in this case determine what was conceded in *Chicago R. I. & Pac. Ry.* v. *Brown*, 229 U. S. 317, 320, that the failure of a coupler to work at any time sustains a charge that the Act has been violated."

The next case upon which counsel for plaintiff relies is *Minneapolis, St. Paul and Sault Ste. Marie Ry.* v. *Popplar, Admr.*, 237 U. S. 369. There deceased, in the course of his duties as a brakeman, "tried repeatedly" to uncouple the head car by pulling on the coupling pin with the lifter at the end of the next car but could not succeed in so doing. All his efforts failing, he finally went between the ends of the two cars to effect the uncoupling by hand and while doing this was killed.

This case was originally tried in a Minnesota state court. Judgment for plaintiff was affirmed by the Supreme Court of Minnesota and the case is reported in 141 N. W. 798. From the Minnesota Supreme Court opinion it appears that there was only one eyewitness to the accident, and that such witness not only testified to deceased's total inability to pull the pin but that that witness also stated that "after the accident he himself tried to lift the pin on the car and could not do it; that it came up half way and blocked" (Op. p. 799). This evidence was further supported by evidence from deceased's conductor that after the accident he found that the coupler could be operated only "with difficulty" and that in his opinion it was a "bad coupler". We submit that the *Popplar* case is readily distinguishable from the one at bar. Popplar's "repeated efforts" just before the accident were all unsuccessful, and after the accident a witness who tried to pull the pin was also

wholly unsuccessful. On the other hand within a second of the time Penn got in a position where he could apply sufficient leverage he succeeded in pulling the pin and he himself admitted that it worked properly (Rec. 37). If the three efforts made by Penn while he ran beside the car had failed to produce an uncoupling, it might well be argued that a jury question was presented. This, however, was not the case.

The next case cited by plaintiff is *St. Joseph & G. I. R. Co.* v. *Moore*, 243 U. S. 311. This also is not a coupler case. Plaintiff's complaint was based on the claim that his injuries resulted because defendant failed to equip its tender with grab irons or hand holds as provided for by Section 4 of the Safety Appliance Act of 1903 (Title 45 U. S. C. A. Par. 4), which requires the use of "secure grab irons or hand holds in the ends and sides of each car for greater security to the men in coupling and uncoupling cars". The sole question involved in the *Moore* case was whether the carrier could be held liable for failure to furnish a hand hold as required by the Act, even though it did provide a pin lifter rod which could have been used as a substitute for the hand hold. This court held that the statute was clear that hand holds in addition to pin lifter rods were required. Obviously, that case has no bearing on the question now before this court.

On page 10 counsel relies on *Minneapolis & St. L. R. Co.* v. *Gotschall*, 244 U. S. 66. The question involved in that case was whether the jury could infer negligence on the part of the carrier from the fact that a coupler unexpectedly opened while a freight train was en route, as a result of which fatal injuries occurred. The court held there might be such inference of negligence "in view of the positive duty imposed by the statute upon

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the railroad to furnish safe appliances for the coupling of cars". Obviously, a coupler which pulls apart for no apparent reason is not one which couples and uncouples automatically within the meaning of the Safety Appliance Act. Admittedly, the coupler in the *Gotschall* case was a defective one. That is not the case here.

Plaintiff's last case on the subject of coupler operation is *Chicago Burlington & Quincy Ry.* v. *U. S.*, 220 U. S. 559. That case was a penalty suit to recover a fine for the use by the carrier of cars on which couplers were admittedly defective. The case merely holds that regardless of negligence the carrier has "an absolute duty" to furnish cars equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. The court did not decide, and was not called on to decide, what was conceded in *Chicago, Rock Island & Pac.* v. *Brown*, 229 U. S. 317, that failure of a coupler to work at any time, regardless of condition of slack and amount of force used, sustains a charge that the Act has been violated.

II.

Where There Is No Substantial Evidence to Prove Plaintiff's Case the Trial Court Should Direct a Verdict for Defendant.

Plaintiff appears to proceed on the theory that, whatever the evidence, a jury verdict must remain inviolate, and that directing a verdict invariably amounts to a substitution of the opinion of the court for that of the jury. Such is not the case.

In *Brady* v. *So. Ry. Co.*, 320 U. S. 476, this court said, commencing at page 479:

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case the jury. *Western & Atlantic R. Co.* v. *Hughes, supra; Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 524. *Cf. Gunning* v. *Cooley*, 281 U. S. 90, 94; *Commissioners* v. *Clark*, 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway* v. *United States*, 319 U. S. 372; *Pence* v. *United States*, 316 U. S. 332; *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, n. 1; *Anderson* v. *Smith*, 226 U. S. 439; *Coughran* v. *Bigelow*, 164 U. S. 301, 307; *Gunning* v. *Cooley*, 281 U. S. 90, 93, note; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 673; *Parks* v. *Ross*, 11 How. 362, 373. See IX Wigmore on Evidence (3d ed., 1940), Paragraphs 2494, *et seq.*"

This court has never retreated from its oft repeated statement that where there is a complete absence of probative facts to support the verdict reversible error occurs. As recently as *Myers* v. *Reading Co.*, 331 U. S. 477, at page 485, the court stated the controlling principle governing the direction of a verdict as follows:

"The respondent is not subject, as has been suggested, to an absolute liability to its employees comparable to that established by a workmen's compensation law. (See *Griswold* v. *Gardner*, 155 F. 2d 333, 334, 337.) • • • The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict.

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'Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Galloway* v. *United States*, 319 U. S. 372, 395 • • •.' *Tennant* v. *Peoria & P. U. R. Co., supra*, at pp. 32-33.

See also *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600; *Brady* v. *Southern R. Co.*, 320 U. S. 476; *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 343; *Western & A. R. Co.* v. *Hughes*, 278 U. S. 496; and *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521, 524."

III.

Errors of Law Not Argued Because Not Considered By Circuit Court of Appeals.

On defendant's appeal to the Circuit Court of Appeals, two grounds of error were urged, that:

(1) The court erred in refusing to grant defendant's motion to instruct the jury to find defendant not guilty; and

(2) The court erred in giving to the jury plaintiff's Instruction E.

Because the Circuit Court of Appeals concluded that there was no substantial evidence to sustain the verdict, and for that reason remanded with directions to enter a judgment notwithstanding the verdict, it was not necessary for it to consider or pass on the errors complained of in instruction E. Counsel for plaintiff has not asked this court to pass on the validity of our objections to instruction E and has refrained from arguing the points involved. Consequently, we shall do like-

wise. *Aetna Casualty & Surety Co. et al.* v. *Flowers*, 330 U. S. 464.

CONCLUSION.

We respectfully submit that it is abundantly clear that the Circuit Court of Appeals properly ruled that there was no substantial evidence in the record proving that the car in question failed to comply with the requirements of Section 2 of the Safety Appliance Act.

Respectfully submitted,

LOWELL HASTINGS,
DRENNAN J. SLATER,
Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948.

No. 19

ALFRED S. PENN,
Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Respondent.

Petition for Rehearing.

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PETITION FOR REHEARING.

To the Honorable Justices of the Supreme Court of the United States:

Now comes Chicago and North Western Railway Company, respondent herein, by its attorneys and presents herewith its petition for rehearing in this cause.

On respondent's appeal to the Circuit Court of Appeals in the above case, two grounds of error were urged:

(1) That the court erred in refusing to grant defendant's motion to instruct the jury to find defendant not guilty; and

(2) That the court erred in giving to the jury plaintiff's instruction E.

Proper objections to the giving of instruction E were made by counsel for respondent on the ground that the instruction ignored the question of whether the slack was in or out when the uncoupling was attempted (Rec. 155). In the Circuit Court of Appeals the parties each argued this point with the authorities relied on, but the Court of Appeals found it unnecessary to pass on the propriety of the instruction because of the conclusion it reached on the merits of the case.

On appeal in this court, counsel for petitioner did not ask the court to pass on the validity of the objections to instruction E, and the only reference to instructions made in the briefs of the parties filed herein appears in the reply brief of petitioner, where reference is made on page 7 thereof to *instruction C.* It is instruction E to which we objected in the Circuit Court of Appeals and not instruction C. Since counsel for petitioner did not ask this court to pass on our objection to instruction E, we likewise refrained from arguing the point, and did so on the basis of *Aetna Casualty & Surety Co.* v. *Flowers,* 330 U. S. 464. In that case respondent sued to recover death benefits under the Workmen's Compensation Law of Tennessee. Petitioner removed the suit from the Tennessee state court to the United States District Court on the ground of diversity of citizenship. The district court dismissed the action for want of proper venue. The Circuit Court of Appeals held that the requisite jurisdictional amount was not involved and directed that the case be remanded to the state court. The Supreme Court of the United States granted certiorari. This court held that the Circuit Court of Appeals erred in concluding that the requisite jurisdictional amount was not involved. Respondent then

sought to support the action of the Circuit Court of Appeals on other grounds. The Supreme Court held that while respondent had a right so to do, the questions had not been passed on by the Circuit Court of Appeals, nor had they adequately been presented in the Supreme Court. Accordingly, this court remanded to the Circuit Court of Appeals so that the additional questions could there be considered.

We submit that the *Flowers* case is squarely in point and that this court should remand to the Circuit Court of Appeals so that the question of error in plaintiff's instruction E may be considered by that court.

Respectfully submitted,

LOWELL HASTINGS,
DRENNAN J. SLATER,
Attorneys for Respondent.

No. 19. PENN *v.* CHICAGO & NORTH WESTERN RAILWAY Co. Certiorari, 333 U. S. 866, to the United States Court of Appeals for the Seventh Circuit. Argued October 14, 1948. Decided October 25, 1948. *Per Curiam:* The judgment is reversed. *Myers* v. *Reading Co.*, 331 U. S. 477. *Royal W. Irwin* argued the cause and filed a brief for petitioner. *Drennan J. Slater* argued the cause for respondent. With him on the brief was *Lowell Hastings*. Reported below: 163 F. 2d 995.